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NEGLIGENCE IN LAW.

NEGLIGENCE IN LAW.

BEING

THE SECOND EDITION

OF

PRINCIPLES OF THE LAW OF NEGLIGENCE.

RE-ARRANGED AND RE-WRITTEN

BY

THOMAS BEVEN,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

*Simus ea mente, quam ratio et veritas præscribit, ut nihil in
vita nobis præstandum præter culpam putemus.*

CICERO, AD FAM. 6, 1.

VOLUME II.

SPECIAL RELATIONS ARISING
OUT OF CONTRACT.

LONDON:

STEVENS AND HAYNES,

Law Publishers,

13, BELL YARD, TEMPLE BAR.

THE BOSTON BOOK CO., BOSTON.

1895.



A27193.

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VOLUME II.
SPECIAL RELATIONS ARISING
OUT OF CONTRACT.

BOOK V.

BAILMENTS.

CHAPTER I.

VARIOUS RELATIONS.¹

GENERAL.

We now enter upon the consideration of bailments.

The term bailment is derived from the Norman French *bailler*, Signification of the term bailment. and signifies to deliver.² It imports a contract resulting from delivery.³

Sir William Jones defines⁴ a bailment as a delivery of goods Sir William Jones's definition. on a condition, expressed or implied, that they shall be restored by the bailee to the bailor, or according to his directions, as soon as the purpose for which they were bailed shall be answered.

Story⁵ objects to this definition, that it assumes that the goods Story's objection. are to be restored or re-delivered, which in the cases of consign-

¹ There is a very learned article in the *Law Quarterly Review* (1886), vol. ii. 188, entitled "Liabilities of Bailees according to German Law"—"Roman" might without impropriety have been substituted for "German"—wherein the law of bailments is most ably treated from the point of view of jurisprudence. Mr. Holmes's chapter on The Bailee at Common Law, in *The Common Law*, 164, is, like the rest of his book, admirable and original. "No one who has read the treatise of Mr. Justice Story on Bailments, the essay of Sir William Jones, and the judgment of Lord Holt in *Coggs v. Bernard*," says Brett, J., in *Nugent v. Smith*, 1 C. P. D. 19, at 28, "can doubt that the common law of England as to bailments is founded upon, though it has not exactly adopted, the Roman Law." Cockburn, C. J., in the same case in the Court of Appeal, 1 C. P. Div. 423, at 428, shews that "it is a misapprehension to suppose that the law of England relating to the liability of *common carriers* was derived from the Roman law"; and contends that this particular rule was introduced by custom as an exception to the general law of bailment, in the reign of Elizabeth and James I. Mr. Holmes, *The Common Law*, 180 *et seqq.*, shews, with great force of learning, that both these views are wrong, and that the strict rule as to the carrier's liability is a survival of the ancient English rule, of which Southcote's case, 4 Co. Rep. 83 b, 1 Cro. (Eliz.) 815, is an illustration.

² 2 Bl. Comm. 451. Shep. Abr. Bailment may be referred to for early cases.

³ Story, Bailm. § 2.

⁴ Essay on the Law of Bailments, 1.

⁵ Bailm. § 2, where in text and notes the whole discussion as to the exact meaning of a bailment is gone into.

ment to a factor for sale is not the case; and substitutes a definition of his own, viz., "a delivery of a thing in trust for some special object or purpose and upon a contract, express or implied, to conform to the object or purpose of the trust."

Kent's objection to Story's definition.

Chancellor Kent, again, objects to this use of the word bailment as "extending the definition of the term beyond the ordinary acceptation of it in the English law," which draws a distinction between a consignment to a factor and a bailment; which latter is narrowed "to cases in which no return or delivery, or re-delivery to the owner or his agent, is contemplated."¹

Distinction between a bailment properly so called and the possession of property by a servant or agent on behalf of the master.

A further distinction must also here be noted between bailment and the possession of property by a servant or agent on behalf of the master.² The latter is not a bailment; since the servant holds in the name of his master; a bailee properly so called holds in his own name. As Lord Ellenborough says:³ "You cannot make my servant whose possession is my possession, my bailee. He is not liable as a bailee. Where goods are delivered to another as a bailee, the special property passes to him; but here it does not. He is merely the servant of government."

Contract to deliver not a bailment.

A mere contract to deliver is not a bailment; for there must be a delivery of the thing bailed.

The person who delivers the thing is called the bailor; the person to whom it is delivered the bailee.

Delivery of the thing to be bailed.

Delivery of a bailment is either actual or constructive.⁴ A constructive delivery is effected by the bailee acting on an authority given at a time and place different from that in which the possession of the goods is assumed; or in circumstances where, though no actual authority to assume possession of the goods is ever given, a presumption of authority is raised.⁵

Thing bailed; a chattel.

The thing bailed must be a chattel,⁶ and must be delivered for a special object or purpose; in the absence of which the delivery constitutes either a gift or a sale.

Duty of bailee.

A bailee, by virtue of the bailment, is bound to take care of the property committed to his hands. The degrees of care marked in law have already been generally examined.⁷ But it

¹ 2 Kent, Comm. 559, n. (a).

² Y. B. 3 H. VIII. 12, pl. 9. See Reeves, Hist. of Eng. Law (2nd ed.), vol. iv. 179.

³ Hopkinson v. Gibson, 2 Smith (K.B.) 202. The case determined that the colonel of a regiment who had purchased horses for Government had not such a special property as to maintain trover for one of them which was taken out of the possession of the sergeant who was taking them to the receiving depôt, as a distress for a turnpike-toll.

⁴ The Queen v. McDonald, 15 Q. B. D. 323; see per Lord Coleridge, C.J., at 326; The Queen v. Ashwell, 16 Q. B. D. 190, at 223; The Queen v. Flowers, 16 Q. B. D. 643.

⁵ Doctor and Student, dial. 2, c. 38.: "If a house by chance fall upon a horse that is borrowed, who shall bear the loss?"; Noy, Maxims, c. 43.

⁶ Williams v. Jones, 3 H. & C. 256, (Ex. Ch.) 602.

⁷ Ante, 20 et seqq.

must not be lost sight of that in a contract of bailment the bailee may impose whatever terms he chooses, if he gives notice of them and the bailor has the means of knowing them.¹ Where terms are imposed, the bailor and bailee are governed by them exactly in the same way they would be in the case of any other contract. Our investigations will be chiefly concerned with ascertaining the relations implied by law where the parties have not specially bargained.

The thing bailed is presumably the thing to be returned. Where this is certain one fruitful cause of difficulty is absent. Yet it happens sometimes that, either from the nature of the thing bailed, or from some act or default of the bailee, the thing bailed becomes mixed with the bailee's property. When this occurs the rights of the bailor, as against the bailee, may assume any of several aspects determined by the circumstance of whether the confusion is the result of intent or of accident, or is a natural result, or a disposition thwarting the object of the bailment.

The general rule of law, as stated by Blackstone,² is: "If the intermixture be by consent, I apprehend that in both laws [*i.e.*, by the common law and the civil law] the proprietors have an interest in common in proportion to their respective shares." But, if one wilfully intermixes his money, corn, or hay with that of another man without his approbation or knowledge, or casts gold in like manner into another's melting-pot or crucible, the civil law, though it gives the sole property of the whole to him who has not interposed in the mixture, yet allows a satisfaction to the other for what he has so improvidently lost.³ But our law, to guard against fraud, gives the entire property, without any account, to him whose original dominion is invaded, and endeavoured to be rendered uncertain without his consent."⁴

It was settled English law so far back as 5 Hen. VIII.⁵ that, despite alterations of form which property might have undergone,

Thing bailed presumably the thing to be returned.

Confusion of property of bailor and bailee.

Old English law.

¹ Per Erle, C. J., *Van Toll v. South-Eastern Railway Company*, 12 C. B. N. S. 75, at 85.

² 2 Comm. 405.

³ *Inst.* 2, 1, 27, 28; *Jeffereys v. Small*, 1 Vern. 217; *Ayliffe Civil Law*, bk. iii. tit. 3, 291.

⁴ *Inst.* 2, 1, 28.

⁵ *Poph.* 38, the case of mixing hay; *Fellows v. Mitchell*, 2 Vern. 515, at 516, "as if another should blend his money with mine, by rendering my property uncertain he loses his own"; *Warde v. Eyre*, 2 Bulst. 323, the case of heaps of money wilfully mixed by the plaintiff at play, the whole of which the defendant kept; 1 Hale, *Hist. of Pleas of the Crown*, 513; *Colville v. Reeves*, 2 Camp. 575, and note at 577; *Lupton v. White*, 15 Ves. 432, at 442. The rule of damages in an action of trover, where the defendant has added to the value of the property converted, is treated in an article on Accession. *Am. Law Mag.* vol. vi. 282, where the law as laid down by Blackstone is followed.

⁶ *Y. B.* 5 H. VII., 15 b, pl. 6. This case is set out in part in *Hartopp v. Hoare*, 3 Atk. 44, at 48; *Fitzh. Abr. Barre* 144; *Bro. Abr. Propertie*, 23.

the owner might seize it in its new shape if he could identify the original materials—as leather made into shoes,¹ or cloth into a coat, or a tree into boards; it was further held, that if grain be taken and made into malt, or money into a cup, or timber into a house, the property is so changed as to alter the title.

Considered.

The case of a house on another man's land may be distinguishable in principle.² The other cases seem rather to differ from the difficulty of proving the identity of malt with particular grain, or a cup with particular silver, than from any different principle involved in the determination of ownership. Where the taking is fraudulent, the taker should stand in no better position than an express trustee.³ Where the taking is wilful but not fraudulent, the taker should be in no better position than if his act were due to his negligence or unskilfulness.⁴

Accidental mixing.

Spence v. Union Marine Insurance Company.

The case of an accidental mixing, where identity is destroyed, is the subject of modern decision. In *Spence v. Union Marine Insurance Company, Limited*,⁵ Bovill, C.J., said: "It has been long settled in our law, that, where goods are mixed so as to become indistinguishable by the wrongful act or default of one owner, he cannot recover,⁶ and will not be entitled to his proportion, or any part of the property from the other owner; but no authority has been cited to shew that any such principle has ever

¹ In *Duncomb v. Reeve*, 1 Cro. (Eliz.) 783, it was held that if a man, having distrained raw hides, tan them, he becomes a trespasser *ab initio* by doing so; for his act, though at first sight a benefit, is an injury to the owner, as the nature of the hides is so changed that he can never be sure of getting them again. If, however, a man who has distrained armour, scour it to preserve it from rust, he does not become a trespasser thereby, for his act is beneficial to the owner.

² Code Civil, art. 552. In *Miller v. Michoud*, 11 Rob. (La.) 225, under the Louisiana Code it is held that where a lessee of ground constructs buildings or other works thereon, with his own materials, the owner of the soil may keep them on paying the value of the materials and the price of the workmanship. The law will not permit a man knowingly though passively to encourage another to lay out money under an erroneous opinion of title: *Dann v. Spurrier*, 7 Ves. 231. But a man is not to be deprived of his legal rights unless he has acted in such a way as to make it fraudulent for him to set up those rights. Fry, J., enumerates the circumstances requisite to enable the plaintiff to recover as follows:—

1. Plaintiff must have made a mistake as to his legal rights.
2. He must have expended money or done some act (not necessarily upon the defendant's land), on the faith of his mistaken belief.
3. The defendant, the possessor of the legal right, must know of his own right which is inconsistent with the right claimed by the plaintiff.
4. He must know of the plaintiff's mistaken belief of his rights.
5. He must have encouraged the plaintiff in the course he has adopted.

"Where all these elements exist there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it": *Wilmott v. Barber* (1880), 15 Ch. D. 96, at 105. The positions of a wilful intermeddler and of an innocent purchaser from him are very fully considered in *Silabury v. Calkins*, 3 N.Y. 380.

³ See per Jessel, M.R., in *re Hallett's Estate*, *Knatchbull v. Hallett*, 13 Ch. D. 696, at 709.

⁴ See *post*, 884. *Lupton v. White*, 15 Ves. 432.

⁵ L. R. 3 C. P. 427, at 437. See *Harris v. Truman*, 7 Q. B. D. 340, at 358.

⁶ Poph. 38; *Ward v. Eyre*, 2 Bulst. 323.

been applied, nor, indeed, could be applied, to the case of the accidental mixing of the goods of two owners; and there is no authority nor any sound reason for saying that the goods of several persons which are accidentally mixed together thereby absolutely cease to be the property of their several owners, and become *bona vacantia*. The goods, before they are mixed, being the separate property of the several owners, unless, which is absurd, they cease to be property by reason of the accidental mixture, when they would not so cease if the mixture were designed, must continue to be the property of the original owners; and as there would be no means of distinguishing the goods of each, the several owners seem necessarily to become jointly interested, as tenants in common, in the bulk." After citing several authorities,¹ the learned judge continues: "We are thus, by authorities in our own law, by the reason of the thing, and by the concurrence of foreign writers, justified in adopting the conclusion that by our own law the property in the cotton of which the marks were obliterated did not cease to belong to the respective owners; and that, by the mixture of the bales, and their becoming undistinguishable by reason of the action of the sea, and without the fault of the respective owners, these parties became tenants in common of the cotton, in proportion to their respective interests. This result would follow only in those cases where, after the adoption of all reasonable means and exertions to identify or separate the goods, it was found impracticable to do so."

To the same effect is the judgment of Blackburn, J., in *Buckley v. Gross*,² in the case of tallow which was melted and flowed into the sewers, and thence into the Thames, whence some of it was taken by different persons who sold it; from whom it was taken by the police and detained; and subsequently sold. The action was for conversion brought by one of the original purchasers against a purchaser from the police. "I dissent," says Blackburn, J.,³ "from the doctrine that because the property of different persons is confused together, that entitles a third person to steal it with impunity. Probably the legal effect of such a mixture would be to make the owners tenants in common in equal portions of the

Buckley v. Gross.

³ Judgment of Blackburn, J.

¹ Mackelvey, *Modern Civil Law* (Eng. ed., 1845), 285; Story, *Bailm.* § 40; Pothier, *Traité du Droit de Domaine de Propriété*, Art IV. § 2, *De la Confusion*, 166.

² 3 B. & S. 574. See *In re Hallett's Estate*, *Knatchbull v. Hallett*, 13 Ch. D. 696, per Jessel, M.R., at 712: explained by the same learned judge, *Kirkham v. Peel*, 43 L. T. 171, at 172. The cases are considered, *National Bank v. Insurance Company*, 104 U. S. (14 Otto) 54; also *First National Bank v. Hummel*, 20 Am. St. R. 257. See also per Lord Abinger, in the case of the mixture of oil by leakage on board ship: *Jones v. Moore*, 4 Y. & C. (Ex.) 351; *Henderson v. Lauck*, 21 Pa. St. 359, the case of mixing corn; also *Bretz v. Diehl*, 117 Pa. St. 589, 2 Am. St. R. 706, and the note as to the distinction between sale and bailment. See further, *Woodward v. Semans*, 21 Am. St. R. 225; *Cloke v. Shafroth*, 31 Am. St. R. 375; and 2 *Parsons, Contracts* (6th ed.), 137.

³ 3 B. & S., at 575.

mass, but at all events they do not lose their property in it."¹

Negligent or
unskilful
mixing.

View of Lord
Eldon, C., in
Lupton v.
White.

Where the mixing is the result of negligence or unskilfulness, the rule is laid down by Lord Eldon:² "If one man mixes his corn or flour with that of another [i.e., negligently or unskilfully], and they were of equal value, the latter must have the given quantity; but if articles of different value are mixed, producing a third value, the aggregate of both, and, through the fault of the person mixing them, the other party cannot tell, what was the original value of his property, he must have the whole." In this view Chancellor Kent coincides,³ holding that no court of justice is bound to make the discrimination for the wrongdoer.

The Idaho.

A more recent and, as to expression, somewhat varied statement of the law on this point is to be found in *The Idaho*:⁴ "all the authorities agree, that if a man wilfully and wrongfully mixes his own goods with those of another owner, so as to render them undistinguishable, he will not be entitled to his proportion, or any part of the property. Certainly not, unless the goods of both owners are of the same quality and value. Such intermixture is fraud. And so, if the wrongdoer confounds his own goods with goods which he suspects may belong to another, and does this with intent to mislead or deceive that other, and embarrass him in obtaining his right, the effect must be the same."

Right of
action.

Both the bailor and bailee may maintain an action against a stranger for an injury to or conversion of the bailment⁵—the bailor by virtue of his general property, the bailee by virtue of his special property⁶ and actual possession.⁷ This right of

¹ *Cp. The Queen v. Lushington, Ex parte Otto* (1894), 1 Q. B. 420.

² *Lupton v. White*, 15 Ves. 432 at 442, from which case *Stuart, V.C.*, in *Cook v. Addison*, L. R. 7 Eq. 466, deduces the rule that "if a trustee or agent mixes and confuses the property which he holds in a fiduciary character with his own property so that they cannot be separated with perfect accuracy, he is liable for the whole."

³ *Hart v. Ten Eyck*, 2 Johns. (Ch. N. Y.) 62. See 2 Kent Comm. 364, and Mr. Holme's note to the 12th ed., 365. *McDonald v. Lane*, 7 Can. S. C. R. 462, is a case of "commingling of logs."

⁴ 93 U. S. (3 Otto) 575, at 585.

⁵ 2 Bl. Comm. 453; *Bac. Abr. Bailm.* (A) (B) (C).

⁶ *Roberts v. Wyatt*, 2 Taunt. 268, at 275. In *Heydon and Smith's Case*, 13 Co. Rep. 67 at 69, the fifth resolution of the judges is: "He who hath a special property of the goods at a certain time shall have a general action of trespass against him who hath the general property." But a "special" property cannot give a right in trover against a general property: *Holliday v. Cammell*, 1 T. R. 658, where it was held that one entrusted with a box containing the funds of a society of which he was a member, and bound by a bond to keep it safely, cannot maintain trover against another member who has taken it from him. Detinue can be maintained by any person who has the immediate right to possession of personal chattels which are wrongfully detained from him, whether that right arises out of an absolute or special property: *Fenn v. Bittleston*, 7 Ex. 152, followed in *Nyberg v. Handelaar* (1892), 2 Q. B. 202; *cp. Guillot v. Dossat*, 4 Martin (La.) 203. One tenant in common of a chattel cannot maintain trover against his co-owner, unless the latter has so disposed of it as to render the plaintiff's enjoyment of it impossible:

⁷ *Bac. Abr. Trespass* (C) 2; *Nicolls v. Bastard*, 2 Cr. M. & R. 659.

action is limited by the interests of the bailee in the bailment. If the bailee has been guilty of a conversion of the bailment or is an insurer of it, or has been guilty of negligence through which the article bailed has sustained the injury in respect of which he sues the wrongdoer, the bailee may maintain an action for the full amount of the damage in respect of which he sues; because he is answerable over to his bailor; but where he is a mere bare possessor and the wrongdoer admits his liability to the bailor whose title is not in dispute, and whose right is an available one, the bailee can in such a case recover no more damage than he has sustained.¹ *Rooth v. Wilson*² has been cited as against this rule. Rightly understood, the case is a confirmation of it; for, as is pointed out by Lord Ellenborough, C.J.,³ the plaintiff's title to sue was based on his negligence in turning out the horse of which he was bailee "into a pasture to which it was unused after dark. That is a degree of negligence sufficient to render him liable; such liability is sufficient to enable the plaintiff to maintain this action."⁴

Bailee may maintain an action to the extent to which he is answerable over to his bailor.

Rooth v. Wilson.

Fennings v. Lord Grenville, 1 Taunt. 241. The law as to trover between tenants in common is considered in *Jacobs v. Seward*, L. R. 5 H. L. 464; see 2 Kent Comm. 350, note (g). It has been held that the joint owner of a chattel is bound to bestow on it that care which a prudent man bestows ordinarily on his own property: *Guillot v. Dossat*, 4 Martin (La.) 203. An action against a wrongdoer to chattels can only be maintained by one who has either some property in, or possession of, the chattel injured; and, says Lord Penzance, *Simpson v. Thomson*, 3 App. Cas. 279, at 289, "if this be true as to injuries done to chattels, it would seem to be equally so as to injuries to the person. An individual injured by a negligently driven carriage has an action against the owner of it. Would a doctor, it may be asked, who had contracted to attend him and provide medicines for a fixed sum by the year, also have a right of action in respect of the additional cost of attendance and medicine cast upon him by that accident? And yet it cannot be denied that the doctor had an interest in his patient's safety. In like manner an actor or singer, bound for a term to a manager of a theatre, is disabled by the wrongful act of a third person to the serious loss of the manager. Can the manager recover damages for that loss from the wrongdoer?" The learned Lord emphatically denied the existence of any such rights. For the different interest required to maintain trespass, trover, and replevin respectively, see per Parsons, C.J., *Waterman v. Robinson*, 5 Mass. 303. For the distinction between trespass and trespass upon the case, see Com. Dig. Action (M 2).

¹ *Claridge v. South Staffordshire Tramway Company* (1892), 1 Q. B. 422; Bac. Abr. Bailment (D). The rule in the Civil Law is *Furti autem actio ei competit, cujus interest, rem salvam esse, licet dominus non sit; itaque nec domino aliter competit, quam si ejus intersit rem non perire*, Inst. 4. 1, § 13. See *Law Quarterly Review*, 1891, vol. vii. 224. Title to Chattels by Possession. Cp. *Story, Bailm.* § 93-g.

² 1 B. & Ald. 59.

³ L. c. at 62.

⁴ The dictum of Parke, B., in *Nicolls v. Bastard*, 2 C. M. & R. 659, at 660, "I think you will find the rule is, that either the bailor or the bailee may sue, and whichever first obtains damages, it is a full satisfaction," is often cited with *Rooth v. Wilson*, in support of the view that the bailee in any state of circumstances can maintain an action; at the best the passage is ambiguous, and is, moreover, a remark thrown out in argument on a point not necessary to the case, and without any indication of the different views being present to the mind of the learned judge. See Bac. Abr. Trespass (C) 655. The point has been mooted whether the owner of goods which have been converted may waive the tort and sue for their value in assumpsit. It is clear that if the goods have been sold he may have an action for the price as money had and received. Thus, in *Rodgers v. Maw*, 15 M. & W. 444, at 448, Pollock, C.B., giving the judgment of the Court, says: "If a man's goods are taken by an act of trespass, and are subsequently sold by the trespasser, and turned into money, he may maintain trespass for the forcible

Chancellor
Kent's view.

Chancellor Kent, however, in his Commentaries,¹ states the law broadly—that a bailee having a special property² recovers only the value of his special property as against the owner, but the value of the whole property as against a stranger; and the balance beyond the special property he holds for the general owner. For this proposition he cites, as his authority, a case *White v. Webb*,³ where, undoubtedly, the proposition was distinctly laid down and a number of cases were referred to as establishing the rule. This being so, and the authority of Chancellor Kent and his Commentaries being so high, it is startling to read that for the proposition so approved “there is no authority; it is wholly repugnant to common sense;”⁴ and there is certainly no case in injury; or, waiving the force, he may maintain trover for the wrong; or, waiving the tort altogether, he may sue for money had and received.” It is not clear whether he may sue for the value if the goods are not sold. *Hill v. Perrott*, 3 Taunt. 274, seems in favour of the affirmative. Lord Ellenborough's opinion inclines to the other side: *Thompson v. Bond*, 1 Camp. 4; *Read v. Hutchinson* 3 Camp. 351. Cp. *Abbotts v. Barry*, 2 B. & B. 369, and *Bennett v. Francis*, 2 B. & P. 550, where money was actually received for the goods converted; also *Foster v. Stewart*, 3 M. & S. 191, where the King's Bench held, following *Lightly v. Clouston*, 1 Taunt. 112 and *Hamblly v. Trott*, 1 Cowp. 375, that a master might waive the tort and recover in assumpsit for the services of an apprentice whom defendant seduced to continue in his service. The same conflict of opinion is found in the American cases. In *Jones v. Hoar*, 22 Mass. 285, after a careful examination of the English and American cases, the conclusion that assumpsit is not maintainable is reached; *Tuttle v. Campbell*, 16 Am. St. R. 652, is to the same effect, holding that the goods converted must be sold before the tort can be waived. *Terry v. Munger*, 121 N. Y. 161 18 Am. St. R. 803, is a carefully considered decision to the contrary, holding that the property in the goods converted passes to the wrong-doer so soon as the plaintiff elects to proceed upon an implied contract. This view appears the more reasonable, since the plaintiff is not able to recover more than the fair value of his goods; while it does not lie in the mouth of the defendant to deny that he had rightfully come by the goods as against their owner. If the owner chooses to act on that assumption, it would appear consistent with sound principle to estop the defendant *allegans turpitudinem suam*. The question might, however, arise not merely between the owner and the converter, but between this latter and a third person, when not improbably other considerations would come in. *London, Brighton, and South Coast Railway Company v. Watson*, 4 C. P. Div. 118, is an authority on waiving a tort; see also *Lightly v. Clouston*, 1 Taunt. 112, and note; *Bac. Abr. Trespass (A) 647*, citing *Pitts v. Gaince*, 1 Salk. 10; *Branscomb v. Bridges*, 1 B. & C. 145; *Bishop v. Viscountess Montague*, 1 Cro. (Eliz.) 824, in which case the Court were equally divided, *Walmsley and Kingsmill, JJ.*, holding: “Where he [plaintiff] might have had a general writ of trespass, he cannot have any other manner of action, especially not this action [trover] which differs from it in nature and quality.” On the other hand, *Anderson, C.J.* and *Warburton, J.*, held: “He [plaintiff] hath election to make it [a taking of goods] a tortious prisa or not, which is the reason that if goods be taken by a trespasser, yet if the party from whom they are taken be attainted of felony, he shall forfeit them; for the right and property remains in him, and the law shall adjudge them in him, until he makes his election to the contrary by bringing a writ of trespass. Wherefore here he might maintain the one writ or the other, at his election.” See also per *Holroyd, J.*, *Moreton v. Hardern*, 5 B. & C. 223, at 228. *Cooley, Torts* (2nd ed.) 107–112; and *Hilliard, Torts*, 44–50. For the law as to the return of goods in detinue, see per Lord Macnaghten, *Peruvian Guano Company v. Dreyfus Brothers* (1892), App. Cas. 170 in the note, at 176.

¹ 2 Kent, Comm. 568 n. (e).

² “It is laid down in many cases, that no one can have a special property in a personal chattel of which he has never had the actual possession”: *Bac. Abr. Trespass (C) 655*.

³ 15 Conn. 302.

⁴ This may seem a somewhat “hasty generalization,” having in view the judgment of *Bovill, C.J.*, and *Denman, J.*, in *Ebworth v. Alliance Marine Insurance Company*, L. R. 8 C. P. 596, holding that a consignee of goods with a partial interest is entitled to insure the whole value of the goods and to recover in his own name for the full amount

which a bailee has recovered damages under such circumstances and has been made to account for an unascertained portion of them to his bailor.¹

The decisions on the point now under examination date back so far as 1506; for we find in the Year Book 21 H. VII. 14 b. pl. 23, in an action of replevin, Fineux, J., saying: "In this case the bailee has a property in the thing against a stranger, for he is chargeable to the bailor, and for the same reason he shall recover against a stranger who takes the goods out of his possession." This is cited by Lord Coke in reporting the 5th resolution in Heydon and Smith's Case, who says, "clearly the bailee or he who hath a special property shall have a general action against a stranger, and shall recover all in damages, because he is chargeable over."² The current of authority since has flowed in the same direction, with the possible exception of the ambiguous utterance of Parke, B., in Nicolls v. Bastard,³ where the present point was not directly before him.

It follows then that the learned judges in Claridge v. South Staffordshire Tramway Company 'lighted upon the correct view, and that the opinion expressed in Kent's Commentaries cannot be regarded as law.⁴

Authorities considered.

View taken in Claridge v. South Staffordshire Tramway Company correct.

"holding the residue in trust for the consignors." True, the case is an insurance case, but the recovery of more than the interest and the holding the amount so recovered in trust are circumstances vital to the two cases. As to the authority of this case, see note to 6 Rev. 721. Cp. Mr. Holmes's note, Insurable Interest, to 3 Kent, Comm. (12th ed.), 376, and Insurance Company v. Stinson, 103 U. S. (13 Otto) 25, as to whether the right of consignees to insure to the full value of the goods, holding the surplus above their own interest for the benefit of the owners, is not more a matter of implied authority than insurable interest. See Home Insurance Company v. Baltimore Warehouse Company, 93 U. S. (3 Otto) 527.

¹ Per Wills, J., Claridge v. South Staffordshire Tramway Company (1892), 1 Q. B. 422, at 424, 425.

² 13 Co. Rep. 67, at 69. Cp. Bac. Abr. Carrier (C).

³ 2 C. M. & R. 659 at 660.

⁴ (1892) 1 Q. B. 422.

⁵ I have examined the list of authorities cited in White v. Webb, 15 Conn. 302, on which the statement in Kent is founded. There are five cases vouched or referred to—(1) Kennedy v. Whitwell, 21 Mass. 466, an action of trover for forty barrels of gin. The decision was merely that, in actions of trover, the value of the article sued for at the time of the conversion, is the measure of damages (see Wood v. Morewood, 2 Q. B. 440 n, Davis v. Oswell, 7 C. & P. 804). (2) Spoor v. Holland, 8 Wend. (N.Y.) 445, an action for taking bricks from a constable who had them in execution, where the judgment is "the judge erred in directing the jury to find for the plaintiff the value of the bricks converted by the defendant to their use. He could recover only the amount of the executions." These were cases of an action by one with a limited interest against the general owner. (3) Brizsee v. Maybee, 21 Wend. (N.Y.) 144, a question of what were damages for detention, but no point as to special or general property arose. (4) Ingersol v. Van Bokkellin, 7 Cowen (N.Y.) 670, an action for the amount of a lien on goods removed. It was held that the holder of the lien had no right to recover beyond the amount of his special property in the goods. (5) Lyle v. Barker, 5 Bin. (Pa.) 457, an action of trespass against a stranger taking a pawn out of the possession of a pawnee, where it was held that the pawnee may recover the whole value and damages although they were pledged for less; because "he is answerable for the excess to the person who has the general property." The judgment was given in the very words of Fineux, J., and of Coke, C.J., in Heydon and Smith's Case. Thus the only case cited which is an authority is an authority for the

In Massachusetts¹ it has been decided that where plaintiff hired a horse and waggon, which defendant negligently injured while in his possession, and the owner had repaired at plaintiff's request and charged the expense to the plaintiff, the plaintiff could recover for the damage without having previously paid the expenses.

Whether in
contract or
tort.

Law laid down
by Tindal, C.J.

The precise nature of the remedy given to the bailor against the bailee has been the subject of much discussion. As the relation constituted by the bailment is a contract, it has been contended that the remedy must be sought in contract; it has also been urged that where the injury complained of is a non-feasance, an additional impediment exists to framing a claim in tort. Both these contentions have, however, been negatived, and the law has been very clearly laid down by Tindal, C.J., in the case of *Boorman v. Brown*,² before the Exchequer Chamber, reversing the judgment of the Queen's Bench. He says: "That there is a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for the breach, or non-performance, is indifferently either assumpsit or case upon tort, is not disputed. Such are actions against attorneys, surgeons, and other professional men, for want of competent skill or proper care in the service they undertake to render; actions against common carriers, against shipowners on bills of lading, against bailees of different descriptions; and numerous other instances occur in which the action is brought in tort or contract at the election of the plaintiff. And, as to the objection that this election is only given where the plaintiff sues for a misfeasance and not for a nonfeasance, it may be answered that in many cases it is extremely difficult to distinguish a mere nonfeasance from a misfeasance; as in the particular case now before us, where the contract stated in the declaration on the part of the broker is, in substance, to deliver the goods of the plaintiffs to the purchaser on payment of the price in ready money, and where, if the broker delivers without receiving the price, the breach of his direct undertaking is as much a wrongful act done by him, that is a misfeasance, as it is a nonfeasance, the distinction between the two being, in that case, very fine and scarcely perceptible. But,

contradictory view to that for which it is vouched. *American District Telegraph Company v. Walker*, 72 Md. 454, 20 Am. St. R. 479, is in accord with the English cases, and for the same reason—because the bailee is answerable over to the general owner. Cp. *Pantam v. Isham*, 1 Salk 19, where lessee for years makes a lease at will, and lessee negligently burns the house thus demised, lessee for years is liable "because he is answerable over to his lessor."

¹ *Brewster v. Warner*, 136 Mass. 57.

² 3 Q. B. 511, at 525.

further, the action of case upon tort very frequently occurs where there is a simple non-performance of the contract, as in the ordinary instance of case against shipowners, simply for not safely and securely delivering goods according to their bill of lading; and, as in the case of *Coggs v. Bernard*,¹ where an undertaking is stated in the declaration as the ground of action; and, to give no further instance, the case of *Marzetti v. Williams*,² where the decision, that the plaintiff was entitled to nominal damages without proof of any actual damage, rests entirely on the consideration that the action, an action on the case, was founded on a contract, not on a general duty implied by law. The principle in all these cases would seem to be that the contract creates a duty, and the neglect to perform that duty, or the nonfeasance, is a ground of action upon a tort."³ In the House of Lords,⁴ Lord Campbell restates the law as laid down by Tindall, C.J.: "Whenever there is a contract, and something to be done in the course of the employment which is the subject of that contract, if there is a breach of duty in the course of that employment, the plaintiff may either recover in tort or in contract."⁵ Mr. Holmes⁶ gives this case as an instance of the primitive assumpsit, which was the inducement to a declaration in tort, being interpreted as a contract in the modern sense.

Principle.

Lord Campbell
in the House
of Lords.

If an injury is done by the wrongful act of one to the property of another, it is clear law that the wrongdoer is liable to the owner quite apart from the existence of any contract, and notwithstanding the existence of any contract between the owner and any third person or between any third person and the wrongdoer.

For injury
done to the
property of
another the
wrongdoer is
liable wholly
apart from
contract.

¹ 2 Ld. Raym. 909, 1 Sm. L. C. (9th ed.), 201.

² 1 B. & Ad. 415.

³ See *Burnett v. Lynch*, 5 B. & C. 589, per Bayley, J., at 604, per Little Dale, J., 609, considered *Moule v. Garrett*, L. R. 5 Ex. 132, affd. L. R. 7 Ex. 101.

⁴ 11 Cl. & F. 1 at 44; *Morgan v. Ravey*, 6 H. & N. 265.

⁵ *Boorman v. Brown* must be considered with reference to *Courtney v. Earle*, 20 L. J. C. P. 7. There it is said, "wherever there is a duty arising from a general employment, there an action may be brought in tort, although the breach of such duty may consist in doing something contrary to an agreement made in the course of such duty by the party on whom such general duty is imposed." It had before that been supposed that the violation of a bare promise without any such general duty was the subject of an action in tort, but that is not so: *Baylis v. Lintott*, L. R. 8 Q. B. 345. See an examination of the law on "The right to maintain an action founded on tort," *Law Mag. N. S.* (1844), vol. i. 191. The conclusion is that an omission to perform one's duty or nonfeasance, seems as proper for the support of an action *ex delicto*, as an act of misfeasance. The distinction between misfeasance and nonfeasance has no place in the law of contracts, properly so called, and does not apply in covenant or assumpsit: *Hare, Contracts*, 166, *et seqq.* As to assumpsit see *Slade's Case*, 4 Co. Rep. 91 a. In *Holmes the Common Law*, there is a very interesting history of the law as to assumpsit, 274-288, 290-297. The subject is also fully treated in the following passages in *Reeves, Hist. of the English Law* (2nd ed.), vol. iii. 244, 394; vol. iv. 171, 380, 527; vol. v. 178, 213; see also 1 *Spence Eq. Jur.* 248, *Hare, Contracts*, 117; *Com. Dig. Action upon the Case upon Assumpsit*; *Bac. Abr. Assumpsit*; *Vin. Abr. Actions [of Assumpsit]*. As to an antecedent moral obligation, see note to *Wennall v. Adney*, 3 B. & P. 247, at 249, and *Eastwood v. Kenyon* 11 A. & E. 438.

⁶ *The Common Law*, 195, note 2.

If the act is a wilful one, the liability is clear; if an ignorant one not less so. The point is put by Bramwell, L.J., with his accustomed vigour.¹ "Where is the duty of care? I answer that duty that exists in all men not to injure the property of others. This is not a mere nonfeasance which is complained of, it is a misfeasance; an act and wrongful. Suppose A lets B a horse, B, with C's licence, puts up at C's stables for reward to C from B, C turns into the stables loose a vicious horse, known to be so, not to injure A's horse but not thinking of the matter; there cannot be a doubt that C would be liable to A if the horse was injured. So if he gave the horse bad oats which injured the horse he would be liable, though he would not be to A, if he omitted to feed him; so here justice is done, though indirectly."

Bailee under
a condition.

At common law and apart from the various Bankruptcy Acts, from 21 Jac. I. c. 19 downwards, a bailee of personal property subject to an agreement for a conditional sale cannot convey the title nor subject it to execution for his own debts until the condition on which the agreement to sell was made has been performed.² And where a bailment is upon the terms, that the bailee is to be absolutely liable in case of fire, the effect has been held by Mellish, L.J., to be not to make the bailee an insurer, but to operate as a contract of bailment which may be thus expressed: "If the property is lost by fire, I will not put you to proof whether it is lost by carelessness or not, it is part of the contract of bailment that I am absolutely liable in the case of a fire."³

Division of
bailments.

The division of bailments has elicited much display of critical power. The principle adopted by Holt, C.J., in *Coggs v. Bernard*, has been excepted to by Sir William Jones;⁴ defended by Mr. Smith in his notes to *Coggs v. Bernard*,⁵ and rejected by Story, whose classification, based on that of Sir William Jones, I shall, in the main, follow.

Three kinds.

Bailments, says Story,⁶ are properly divisible into three kinds:

First, those in which the trust is exclusively for the benefit of the bailor or of a third person.

Second, those in which the trust is exclusively for the benefit of the bailee.

Third, those in which the trust is for the benefit of both parties, or of both or one of them and a third person.

¹ *Hayn v. Culliford*, 4 C. P. Div. 182, at 518. As to joint delinquents, *Palmer v. Wick and Pulteneytown Steam Shipping Company* (1894), App. Cas. 318.

² The whole subject is thoroughly examined in the judgment in *Harkness v. Russell*, 118 U. S. (11 Davis) 663. See *Ex parte White*, *In re Nevill*, L. R. 6 Ch. 397.

³ *North British and Mercantile v. London, Liverpool, and Globe Insurance Company*, 5 Ch. Div. 569, per Mellish, L.J., at 584.

⁵ 1 Sm. L. C. (9th ed.), 201, at 225, 226.

⁴ *Jones, Bailm.* 35.

⁶ *Bailm.* § 3.

In the first class are deposits and mandates; in the second, gratuitous loan for use, called in the civil law *commodatum*; in the third, pawn; hiring; and letting to hire. This last falls into two subdivisions: 1. The hiring of a thing for use (*locatio rei*); 2. The hiring of work and labour (*locatio operis*); this, in its turn, is again subdivided into (a) *Locatio operis faciendi*, or the hire of work and labour to be done, or care and attention to be bestowed, on the goods bailed by the bailee for a compensation; (b) *Locatio operis mercium vehendarum*, or the hire of the carriage of goods from one place to another for a compensation.

This division is possibly derived from Huber,¹ whose statement of the rule of diligence is very neat. *Contractus vel incuntur in utriusque commodum, vel in alterutrius utilitatem duntaxat. Qui utriusque partis utilitatem continent, mediocri diligentia contenti sunt, levemque culpam recipiunt; qui unius saltem commodum spectant, hi vel continent utilitatem ejus qui de damno queritur, vel in ejus gratiam initi fuere, qui damnum fecit. Priori casu nil nisi lata culpa præstatur, posteriore levissima.*

Huber's statement of the rule of diligence.

We now proceed to consider these different classes of bailments in their order, setting out, however, first the general principles governing in determining the amount of care in each case as fixed in the Civil Law. *Nunc videndum est, quid veniat in commodati actione: utrum dolus, an et culpa? an vero et omne periculum? Et quidem in contractibus interdum dolum solum, interdum et culpam præstamus. Dolum in deposito; nam quia nulla utilitas ejus versatur apud quem deponitur, merito dolus præstatur solus, nisi forte et merces accessit; tunc enim (ut est et constitutum) etiam culpa exhibetur; aut si hoc ab initio convenit, ut et culpam et periculum præstet is penes quem deponitur. Sed ubi utriusque utilitas vertitur, ut in empto, ut in locato ut in dote, ut in pignore, ut in societate, et dolus et culpa præstatur. Commodatum autem plerumque solam utilitatem continet ejus cui commodatur; et ideo verior est Quinti Mucii sententia existimantis, et culpam præstandam et diligentiam.² There is also the famous passage:³ *Contractus quidam dolum malum duntaxat recipiunt; quidam, et dolum et culpam; dolum tantum depositum et precarium; dolum et culpam mandatum, commodatum, venditum, pignori acceptum, locatum, item dotis datio, tutelæ, negotia gesta (in his quidem, et diligentiam⁴) societas, et rerum communio et dolum et culpam recipit; sed hæc ita, nisi si quid nominatim convenit, vel plus, vel minus, in singulis contractibus; nam hoc**

Rule determining the amount of care required in the various classes of bailments in the civil law.

¹ *Praelectiones Juris Civilis*, 3, 15, 9, (g).

² D. 13, 6, 5, § 2.

³ D. 50, 17, 23.

⁴ For an account of the controversy on the interpretation of this passage, see Jones *Bailm.* 18 et seqq.

servabitur, quod initio convenit; legem enim contractus dedit; excepto eo quod Celsus putat non valere, si convenerit, ne dolus præstetur; hoc enim bonæ fidei iudicio contrarium est; et ita utimur. Animalium vero casus, mortes, quæque sine culpa accidunt, fugæ servorum, qui custodiri non solent, rapinæ, tumultus, incendia, aquarum magnitudines, impetus prædonum a nullo præstantur.

I. DEPOSIT.

Definition.

Depositum est, quod custodiendum alicui datum est. Dictum ex eo, quod ponitur; præpositio enim de, augeat depositum, ut ostendat, totum fidei ejus commissum quod ad custodiam, rei pertinet.¹

Deposit, says Sir William Jones,² is the bailment of goods to be kept for the bailor without a recompense.

It is classified in the civil law under the heading *re*;³ that is, is reckoned one of those contracts where the obligation arises from an inference from the facts and not from express agreement.

Deposit necessary and voluntary.

Deposit in the civil law is of two kinds—necessary and voluntary. A necessary deposit is such as is made by the party under some pressing necessity,—*tumultus, incendium, ruina aut naufragium*—and thence is called *miserabile depositum*.⁴ A voluntary deposit is such as arises from the mere consent and agreement of the parties. This distinction was of practical importance, because in cases of default in the care of voluntary deposits the action was only *in simplum*; in the case of the *miserabile depositum* it was *in duplum*⁵ whenever the depositary was guilty of any default.⁶ The common law does not recognize this distinction.⁷

¹ Dig. 16, 3, 1. *Le dépôt est un contra par lequel l'un des contractants donne une chose à garder à l'autre, qui s'en charge gratuitement, et s'oblige de la rendre lorsqu'il en sera requis*: Pothier, *Traité du Contrat de Dépôt*, 1.

² Bailm, 117, Definitions.

³ Contracts *re* were divided by the Roman jurists into—1. *Mutuum*; 2. *Commodatum*; 3. *Pignus*; 4. *Depositum*. A loan for consumption was termed *mutuum* because *ex meo tuum fit*. *Commodatum* was a gratuitous loan; if the lender stipulated for a compensation, the agreement changed its character and became one of letting and hiring. *Pignus*: pawn. What the nature of *depositum* was appears in the text.

⁴ If this division is to be regarded as other than partial it is necessary to include under it those deposits treated of by Pothier, *Traité du Contrat de Dépôt*, under his second article of ch. iv. *Des dépôts judiciaires*. *Post*, 904.

⁵ Inst. 4, 6, 17, 23; D. 16, 3, 18. Huber's division is different: *Prælectiones Juris Civilis*, 3, 15, 11; so is that of Pothier, *Traité du Contrat de Dépôt*, 1. They divide deposit into simple and by stake-holder. *Le séquestre est le dépôt qui est fait par deux déposants qui ont des intérêts différents, à la charge de rendre la chose à qui il sera jugé qu'elle devra être rendue*. See Code Civil, arts. 1955–1963.

⁶ Story, *Bailm.* § 44, citing Pothier, *Traité du Contrat de Dépôt*, n. 75. *Prætor ait: quod neque tumultus, neque incendii, neque ruinæ, neque naufragii causa depositum sit, in simplum, earum autem rerum quæ supra comprehensæ sunt, in ipsum in duplum . . . judicium dabo*, D. 16, 3, 1, § 1.

⁷ Jones, *Bailm.* 49.

The duties of the *depositarius* are :

1st. To be answerable for *dolus* ; *nam quia nulla utilitas ejus versatur apud quem deponitur*.¹ Duties of the depositaries

2nd. To return the deposit in as good condition as when he received it. He is not liable for deterioration caused by circumstances outside his control ; although the *onus* is on him to shew that deterioration which has happened has been thus caused.²

3rd. To restore the deposit on demand with any fruits it may have borne whilst under his control.³

4th. Not to use the deposit unless with the depositor's special consent.⁴

A deposit can only be of personal or moveable property, and is inapplicable to real or immoveable property.⁵ It is not necessary for the depositor's title to be absolute ; a lawful possession will enable him to maintain his action.⁶ Nature of a deposit.

A deposit may be made and received by all persons who are capable of making a valid contract. If an infant receives a deposit, he is bound to restore it on demand so long as it is in his possession or under his control ; not under the law of bailments, for, from want of capacity, no bailment is made ; but because the Who may make a deposit.

¹ D. 13, 6, 5, § 2. *Diligentia in suis rebus* is the test. *Nisi tamen ad eum modum curam in deposito præstat, fraude non caret : nec enim solva fide minorem his quam suis rebus diligentiam præstabit*, D. 16, 3, 32. The English law does not follow the civil in this. If the depositor knows, or may be presumed to know, the general character of the depositary, the civil law rule is good ; but if the depositor does not know this, the depositary is bound to bestow ordinary care on the deposit, though he does not on his own goods, and such care is to be ascertained without reference to the character of the depositary. See *The William*, 6 C. Rob. (Adm.) 316, the case of a capture lost through neglect to take a pilot on board ; and *post*, 897.

² D. 16, 3, 1, § 16 ; Code 4, 34, 11.

³ D. 22, 1, 38, § 10.

⁴ *Si deposita pecunia is qui eam suscepit usus est, non dubium est, etiam usuras debere præstare*, Code 4, 34, 4.

⁵ Story, *Bailm.* § 51.

⁶ *Armory v. Delamirie*, 1 Sm. L. C. (9th ed.) 385 ; *Sutton v. Buck*, 2 Taunt. 302 ; *Burton v. Hughes*, 2 Bing. 173. *Tadman v. Henman* (1893), 2 Q. B. 168, is a case the correctness of the decision in which is far from clear. The possessor of land the title to which was in another, in distraining on his tenant, distrained the goods of a third person, who brought an action for the conversion. It was held that such third person was not estopped from denying the distrainer's title, and *therefore* could recover as for a conversion of the goods distrained. There does not appear to be any necessary connection between the two propositions. Assuming the relevancy of the proposition that there was no estoppel, whose title was the third person to set up ? A right in herself to trespass, or a right in some one else who acquiesced in the possession of the distrainer ? See *Catteris v. Cowper*, 4 Taunt. 547. The law is clear. "All the old law," says Cockburn, C.J., in *Asher v. Whitlock*, L. R. 1 Q. B. 1 at 5, "on the doctrine of disseisin was founded on the principle that the disseisor's title was good against all but the disseisee," and, at 6, "Possession is good title against all but the true owner." Lord Watson reiterates this in *Mussammat Sundar v. Mussammat Parbati*, L. R. 16 Ind. App. 186, at 193. "Actual possession gives," says Lord Blackburn, in *Bristow v. Cormican*, 3 App. Cas. 641, at 661, "a title in itself." This is subject to what is said in *Doe dem Carter v. Bernard*, 13 Q.B. 945. But this consideration is not applicable where the plaintiff sues for a conversion ; *Chambers v. Donaldson*, 11 East, 65, see also note at 70. See further Sir Frederick Pollock on Possession, Introduction, § 5. The civil law doctrines of possession are well given and discussed in Moyle, *Just. Inst. Excursus* 3 (2nd ed.), 334. Mr. Holmes's 6th lecture is on Possession, *The Common Law*, 206-246. See a curious story about disputed possession among the Locri, in Polybius, 12, 16.

infant is doing a wrongful act by detaining the deposit.¹ On general principles of law an infant may make a deposit; yet if he does, difficult questions may arise as to whether he can recall the thing deposited, or whether in all circumstances the depositary is justified in surrendering it. Similar considerations apply with regard to other classes of people under disability.

Old law as
stated in
Southcote's
Case.

The old law of bailment as presented in *Southcote's Case*² was that the bare acceptance of goods to keep implies a promise to keep them safely, or, as Coke, C.J., says, "to be kept and to be kept safe is all one," and the bailee is answerable at his peril, for if he is robbed he has his remedy over by trespass or appeal.

Law as stated
by Blackstone.

Blackstone³ states the modern law: "If a friend delivers anything to his friend to be kept for him, the receiver is bound to restore it on demand; and it was formerly held that in the meantime he was answerable for any damage or loss it might sustain, whether by accident or otherwise; unless he expressly undertook to keep it only with the same care as his own goods, and then he should not be answerable for theft or other accidents. But now the law seems to be settled upon a much more rational footing that such a general bailment will not charge the bailee with any loss, unless it happens by gross neglect, which is construed to be evidence of fraud;⁴ but if he undertake specially to keep the goods safely and securely, he is bound to answer all perils and damages that may befall them for want of the same care with which a prudent man would keep his own."

Amount of
care.

The question of the amount of care which a prudent man would use in the custody of his own goods, we have seen,⁵ is not to be determined by any hard-and-fast rule, but must be the subject of an inference drawn by the jury in each individual case, and is dependent on the nature and quality of the goods bailed, and the character and customs of the place where the bailment is effected. What would be gross negligence in the custody of a diamond bracelet might be very exceptional care in the custody of a

¹ *Mills v. Graham*, 1 B. & P. (N. R.) 140, at 145.

² *Southcote's Case*, 4 Co. Rep. 83 b, 1 Cro. (Eliz.) 815. The transition from the law as expressed in *Southcote's Case* to the modern doctrine is treated more at length, *post*, 899. *Kettle v. Bromsall*, Willes (C. P.), 118. See *Foster v. Essex Bank*, 17 Mass. 479.

³ 2 Comm. 453.
⁴ *Ante*, 49. "And if there be such a gross neglect, it is looked upon as an evidence of fraud": per Holt, C.J., *Coggs v. Bernard*, 1 Sm. L. C. (9th ed.) at 211.

⁵ *Ante*, 881. The diligence required of a depositary in the Roman law is thus stated: *Nec enim salo fide minorem iis, quam suis rebus, diligentiam præstabit*, D. 16, 3, 32. *Nam quia nulla utilitas ejus versatur apud quem deponitur, merito dolus præstatur solus, nisi forte et merces accessit; tunc enim (ut est et constitutum) etiam culpa exhibetur*, D. 13, 6, 5, § 2. Among the Greeks the care of a deposit was a sacred trust, as is shewn by the story of Glaucus (Herod. 6, 86), whose punishment for even in thought doubting about restoring a deposit was the failure of his family line. The Pythoness replied to an inquiry whether restoration might be withheld, that it was as bad to have tempted the god as it would have been to have done the deed.

tin pot ; a ton of coals suggests a different standard from a heap of jewels, and a delicate microscope from an ordinary barometer.¹ A deposit of any of these articles obliges the depositary to exert care proportioned to its kind ; and in the case of any, if he is guilty of gross negligence—that is, the want of that care which every man of common prudence, how inattentive soever, is expected to take of his own concerns²—he will be liable for injury or loss. The judge determines the law applicable and directs the jury what test they are to apply. The duty of the judge is to non-suit,³ though the facts proved would constitute evidence in some circumstances, if there is not enough evidence in the particular circumstances to warrant the inference required—*e.g.*, if there is evidence of slight negligence where ordinary negligence alone will raise the presumption, or if there is evidence of but ordinary negligence where less than gross negligence is not sufficient.

All this is very clearly put by Sir William Stawell, Chief Justice of Victoria, in *Giblin v. M'Mullen*:⁴ “Negligence is a negative, not a positive term, it involves the non-performance of a duty ; and that duty, though affected by the special facts of the case, must be defined by the Court. The nature of the duty varies with the existence or absence of reward. That of gratuitous Bailees is very different from that of Bailees for hire ; the distinction between these several kinds of duty is a legal one, determined or determinable by recognized principles. If a jury, not the Court, are to decide on the distinction, it would depend on matters of fact, not on known principles of law ; and if the Court must decide on some, we think, as put during the argument, they must decide on all such questions. The defining the duty, too, necessarily involves the deciding on the sufficiency of the evidence to go to a jury. For if the Court, having defined the duty, is of opinion that there is no evidence of a breach of that duty, the plaintiff should be nonsuited, unless actions for negligence are to be tried in a mode different from all others. There may be evidence of negligence, but that is not sufficient, there must be evidence of actionable negligence, of a breach of duty imposed on the defendant. It is not disputed that if there is any evidence for the jury, they constitute the proper tribunal to decide thereon. There are, doubtless, some observations in *Doorman v. Jenkins*⁵ on which the plaintiff relied, as tending to shew that the question of negligence is for the jury. But in that case there was, in the opinion of the Court, evidence of gross negligence, it was

¹ *Batson v. Donovan*, 4 B. & Ald. 27.

² *Jones*, Bailm. 118, *ante*, 49.

³ *Moffatt v. Bateman*, L. R. 3 P. C. 115, *ante*, 14, 158.

⁴ L. R. 2 P. C. 317, at 324.

⁵ 2 A. & E. 256.

unnecessary, therefore, to pronounce decisively on the point for which the case is now cited; and some of the learned judges abstain in marked terms from expressing any decided opinion on an extra-judicial question. Before and since that decision there have been numerous cases in which plaintiffs have been non-suited on the grounds of the insufficiency of the evidence adduced."

What "gross negligence" means with reference to a deposit.

The rule that a depositary is liable only for gross negligence has been interpreted to mean gross negligence as manifested by a comparison with the way that he keeps his own goods. "For if," says Holt, C.J., "he keeps the goods bailed to him but as he keeps his own, though he keeps his own but negligently, yet he is not chargeable for them, for the keeping them as he keeps his own, is an argument of his honesty."¹ Sir William Jones,² Pothier,³ Lord Mansfield,⁴ and Chancellor Kent⁵ adopt the same view. Nevertheless, it seems inconsistent with the modern authorities. The point was definitely raised in *Rooth v. Wilson*,⁶ where A sent his horse for the night to B, who turned it out after dark into his pasture-field adjoining to, and separated from, a field of C's by a fence which C was bound to repair. The horse, from the bad state of the fence, fell from one field into the other, and was killed. After verdict for the plaintiff, a rule for a new trial was obtained on the ground that the defendant was a gratuitous bailee, and turned the horse into that pasture which his own cattle were in the constant habit of using. Lord Ellenborough said:⁷ "The plaintiff certainly was a gratuitous bailee, but, as such, he owes it to the owner of the horse, not to put it into a dangerous pasture, and if he did not exercise a proper degree of care he would be liable for any damage which the horse might sustain. Perhaps the horse might have been safe during the daylight, but here he turns it into a pasture to which it was unused after dark. That is a degree of negligence sufficient to render him liable."

Rooth v. Wilson.

Lord Ellenborough's judgment.

¹ *Coggs v. Bernard*, 2 Lord Raym. 909, at 914, 1 Sm. L. C. (9th ed.) 201, at 210. "As suppose," says Holt, C.J., "the bailee is an idle, careless, drunkard fellow, and comes home drunk and leaves all his doors open, by reason whereof the goods happen to be stolen with his own: yet he shall not be charged, because it is the bailor's own folly to trust such an idle fellow," 2 Lord Raym. at 914. On the other hand, if the bailee is preternaturally sharp in his own affairs, yet in the matter of the bailment he slightly relaxes his vigilance, so that the deposit is lost, in Pothier's opinion he is liable, for he is bound to the same kind of diligence which he uses in his own affairs: Pothier, *Traité du Contrat de Dépôt*, n. 27.

² Bailm. 46.

³ *Traité du Contrat de Dépôt*, n. 27.

⁴ *Gibbon v. Paynton*, 4 Burr. 2298, at 2300. "The latter [the bailee] is only obliged to keep the goods with as much diligence and caution as he would keep his own."

⁵ 2 Comm. 563; also Lord Kenyon, *Finucane v. Small*, 1 Esp. (N. P.) 515.

⁶ 1 B. & Ald. 59.

⁷ L. c. at 61.

Again, in *Doorman v. Jenkins*,¹ Lord Denman directed the jury² that it did not follow from the defendant's having lost his own money at the same time as the plaintiffs that he had taken such care of the plaintiff's money as a reasonable man would ordinarily take of his own; and that the fact relied on was no answer to the action, if they believed that the loss occurred from gross negligence. On motion for a new trial it was not contended that a gratuitous bailee who keeps another person's goods as carefully as his own cannot be liable for the loss or be guilty of gross negligence; all that was urged was that the plaintiff had not made out a *prima facie* case. In discharging the rule, Taunton, J., said;³ "The defendant receives money to be kept for the plaintiff. What care does he exercise? He puts it, together with money of his own (*which I think perfectly immaterial*), into the till of a public-house."

Doorman v. Jenkins.

Taunton, J.'s judgment.

In *The William*,⁴ the case of a justifiable capture, Lord Stowell treats the same subject. "On questions of this kind," said he,⁵ "there is one position sometimes advanced, which does not meet with my entire assent, namely, that captors are answerable only for *such care* as they would take of their own property. This, I think, is not a just criterion in such case; for a man may, with respect to his own property, encounter risks, from views of particular advantage, or from a natural disposition of rashness, which would be entirely unjustifiable, in respect to the custody of goods of another person, which have come to his hands by an act of force. Where property is confided to the care of a particular person, by one who is, or may be supposed to be, acquainted with his character, the care which he would take of his own property might, indeed, be considered as a reasonable criterion."

Lord Stowell's judgment in *The William*.

A bailee's conduct with his own goods may be reckless, and then, unless the person committing goods to his care is aware of the fact or negligently oblivious of it, he can require a greater degree of care for his goods than the depositary bestows on his own. The test in general is not what any particular man does, but what men as a class do with similar property as a class.

Test applicable.

This is the rule laid down in *Tracy v. Wood*:⁶ "The true way of considering cases of this nature, is, to consider whether the party

Tracy v. Wood.

¹ 2 A. & E. 256; Cp. *Wilkinson v. Coverdale*, 1 Esp. (N.P.) 74, decided by Lord Kenyon on the authority of a MS. note of Mr. Justice Buller in *Wallace v. Tellfair*; *Beauchamp v. Powley*, 1 Mo. & R. 38.

² 2 A. & E. 256 at 258.

³ *L. c.* at 261.

⁴ 6 Ch. Rob. (Adm.) 316. *Ante*, 893 n. 1.

⁵ 3 Mason (U.S.) 132, at 135. See *Palin v. Reid*, 10 Ont. App. 63, where a guest at an inn, when leaving, and after paying his bill, asked to be allowed to leave a box in the room of the inn used for storing luggage, intending to fetch it the following day. He was prevented, by illness, from fetching it then, and when able to go for it found it was lost. It

has omitted that care which bailees without hire or mandataries of ordinary prudence usually take of property of this nature. If he has, then it constitutes a case of gross negligence. The question is not whether he has omitted that care, which very prudent persons usually take of their own property, for the omission of that would be but slight negligence; nor whether he has omitted that care which prudent persons ordinarily take of their own property, for that would be but ordinary negligence. But whether there be a want of that care, which men of common-sense, however inattentive, usually take, or ought to be presumed to take of their property, for that is gross negligence. The contract of bailees without reward is not merely for good faith, but for such care as persons of common prudence in their situation usually bestow upon such property. If they omit such care, it is gross negligence."¹ We have here, then, a most authoritative statement—for it is Judge Story who speaks—that reference is to be made, not to the conduct of any particular man to fix a standard of care or negligence, but to the average to be expected from the generality of men.

The standard of care is the average to be expected from the generality of men.

Pothier's case of bailee saving his own goods in preference to those of the bailor.

In this connection Pothier gives an example that may be reproduced.² Depositary's house is on fire. He removes his own goods, leaving those of the bailor to be burnt. If he had time to remove the burned goods, he is certainly liable. If he had not, Pothier thinks a breach of faith cannot be imputed to him for having saved his own goods in preference to his bailor's. If, however, the goods bailed were greatly more valuable than his own, and as easily to be got away, then he ought to rescue them and look to an average indemnity for the loss of his own.

Four exceptions to depositary's responsibility.

To the principle that a depositary is answerable only for gross negligence Sir William Jones³ enumerates four exceptions; of which two only are strictly exceptions, the others being concerned with cases which are not properly deposit. These we now have to consider.

First exceptions: Where there is a special agreement.

First: A depositary is answerable for a different degree of care where he makes a special agreement. In so far as this is an assertion of the right of two people to attach incidents to a

was held there must be proof of actual negligence, as the innkeeper was merely a gratuitous bailee. *Eldridge v. Hill*, 97 U.S. (7 Otto) 92, is an authority for the extent of responsibility of a gratuitous bailee of money for paying over the same to a third person in respect of the recovery of property, which on being handed over to the owner is found in a damaged condition.

¹ See *Batson v. Donovan*, 4 B. & Ald. 21; *Duff v. Budd*, 3 B. & B. 177.

² *Traité du Contrat de Dépôt*, n. 29.

³ *Bailm.* 47-50. *Sed is aquid quem res deposita est custodiam non prestat, tantumque in eo obnoxius est, si quid ipse dolo fecerit; qua de causa si res ei subrepta fuerit, quia restituenda, ejus nomine depositi non tenetur, nec ob id ejus interest rem salvam esse, Gaius, 3. § 207.*

contract entered into by them, varying those implied by law, it requires no particular notice.¹ Sir William Jones, however, instances Southcote's Case as an illustration of the bailee by special agreement engaging to answer for less than gross negligence. Southcote's Case has so important a place in the history of the early law of bailments, that this opportunity may be taken to ascertain its bearings with regard to both earlier and later law. Position of Southcote's Case in the history of the law.

The history of the development of our present law of bailments, so far as it deals with the amount of care exacted from a bailee, is curious and instructive. In the first stages of the law, possession was essential to found a power to take legal proceedings with reference to property; and where possession was lost against one's will, a possession thus involuntarily interfered with, had to be averred as the condition for setting in motion the procedure for its recovery. Since, then, "procedure depended on possession and not on ownership," "if chattels were intrusted by, their owner to another person, the bailee, and not the bailor, was the proper person to sue for their wrongful appropriation by a third." This rule applied indiscriminately to all kinds of bailments. As then the power and the duty to recover the property was the same in all cases of bailment, so also was the obligation to answer to the bailor for property intrusted, and which was interfered with by a third party while in the bailee's custody, and only recoverable in specie by the bailee's resorting to his legal remedy.² Southcote's Case³ is the matured expression of this strict rule of the old law, and asserts that, upon a general bailment to keep safely, the bailee is responsible for a loss occasioned by theft, whether the theft was by his servants or by others. The report adds: "*Nota*, reader, it is good policy for him who takes any goods to keep, to take them in special manner, *scil*, to keep them as he keeps his own goods, or to keep them the best he can at the peril of the party; or if they happen to be stolen or purloined, that he shall not be answerable for them; for he who accepteth them, ought to take them in such or the like manner, or otherwise he may be charged by his general acceptance." About the same time Sir Edward Coke states the law⁴ to be that the engage-

¹ This is still, with few exceptions, the law of England, *ante*, 874 n.¹, and always was the rule of the civil law. *Si quid nominatim convenit, vel plus, vel minus, in singulis contractibus: nam hoc servabitur, quod initio convenit: legem enim contractus dedit*: D. 50, 17, 23.

² See Holmes, *The Common Law*, 166.

³ (1601) 4 Co. Rep. 83 b, 1 Cro. (Eliz.) 815.

⁴ Co. Litt. 89 a. The first edition of Coke upon Littleton was published in 1628. Southcote's Case was decided in 1601. Hargrave's note on the passage cited is: "This doctrine was denied by the Court in the great case of Coggs and Barnard; and it is now understood, that the acceptance of goods to be kept generally is merely an undertaking to keep them as the party receiving keeps his own: 2 Ld. Raym. 911."

ment of the bailee is to keep safely, "and therefore he must keep them at his peril. So it is if goods be delivered to one to be kept, for to be kept and to be safely kept is all one in law." His conclusion is that, if goods are to be safely kept, and afterwards are stolen, the bailee shall not be excused, since by accepting the goods he undertook to keep them safely, to which obligation he must be held. If, however, the goods are delivered to him to keep as he would keep his own, then, if they are stolen without his default or negligence, he shall be discharged.¹

Two points raised in Southcote's Case.

In Southcote's Case two main principles appear to have been insisted on.

(1) That between the duty to keep and to keep safely there is no difference.

First, overruled by *Coggs v. Bernard*.

This, the unqualified rule of the older law, was overruled by Holt, C.J., in *Coggs v. Bernard*,² who distinguishes between bailees for reward and other bailees whose liability had up till then been identical, and who were alike bound absolutely to answer for the bailment. Holt, C.J.'s judgment, in *Coggs v. Bernard*, if thus an innovation on this old law, or rather an eversion of it, which repudiates the identity of obligation that had hitherto existed, and, leaving untouched, and as a stricter liability applied to bailees for reward exercising a public calling, that which by the old English law was the general law applicable to bailments generally, restricts the liability in all other cases of bailment to the exercise of ordinary and usual care. Holt, C.J.'s, "further qualification," says Mr. Holmes,³ "'exercising a public calling,' was part of a protective system which has passed away. One adversely inclined might say that it was one of many signs that the law was administered in the interest of the upper classes." At the present day, Holt, C.J.'s, exception is confined to common carriers and innkeepers; and the discussion as to whether the liability, in any case, of the bailee is that of an insurer or of one owing no more than ordinary care, turns on the inquiry whether any particular class of bailees can be reckoned amongst common carriers or innkeepers. Thus the presumption of the old law has been reversed.

Second, confirmed.

(2) The second principle affirmed in Southcote's Case and in respect of which that case must be specially noticed, is that, in accepting goods to be kept as the bailee would keep his own proper goods, if the goods are stolen the bailee shall not

¹ Cp. 2 Bl. Comm. 452; *Armfield v. Mercer*, 2 Times L. R. 764.

² (1703) 2 Ld. Raym. 909, 910, 911, 914, 915. *The King v. Viscount Hertford*, 2 Show. 172. *Brooke, Abr. Bailm.* 7.

³ *The Common Law*, 203.

answer.¹ As to this Sir William Jones² says: "Robbery by force is considered as irresistible, but a loss by private stealth is presumptive evidence of ordinary neglect." This is undoubtedly the doctrine of the civil law,³ but the common law has not followed the rule,⁴ and does not view theft in any exceptional light, neither imputing it to the neglect of the bailee, nor yet exempting him from responsibility on that ground alone. Each case must be "clothed in circumstance," and on that the law decides whether there has or has not been the required degree of care.⁵ For example, a man has valuable property deposited with him, stolen through leaving an open door or window. There is presumptive evidence of negligence. The theft is, however, by a presumably responsible servant availing himself of facilities special to a servant. This is not presumptive evidence of negligence against him, for the theft is the wilful act of the servant, defeating his master's interest.⁶ Still if the master can be shewn to have engaged a servant without taking proper precautions to secure an honest one, the presumption of negligence is raised; if for example, he has hired a servant out of prison on ticket-of-leave to have the charge of goods, there was opportunity and temptation to steal. In the case of a bailee again, who has lost goods by theft, and who fails to give any such explanation of his neglect to restore the property entrusted to him as will enable the bailor to test his good faith, such bailee will have the *onus* cast on him of shewing he has exercised ordinary diligence in the care of the bailment for which he does not account. If, however, the case has come before a jury, and they have found, as an inference from the facts, that there has been a theft of the bailment, the

Sir William Jones's view.

The view approved by authority.

¹ Cp. Bonion's Case, Y. B. 8 E. II. 275; Fitzh. Abr. Detinue, 59; jewels in a chest were deposited, the depositor keeping the key and not informing the depositary of the contents. The depositary's house being broken into and the chest stolen, an attempt was made to charge the bailee; but he was held not liable, since he used ordinary diligence and the loss was by a burglary.

² Bailm. 119. See also 43, and note 16 to Theobald's edition.

³ *Si res vendita per furtum perierit, prius animadvertendum erit quid inter eos de custodia rei convenerat. Si nihil appareat convenisse, talis custodia desideranda est a venditore qualem bonus paterfamilias suis rebus adhibet; quam si praestiterit et tamen rem perdidit, securus esse debet ut tamen scilicet vindicationem rei et conditionem exhibeat emptori*, D. 18, 1, 35, § 4; see also D. 18, 6, 1; D. 18, 6, 8. *Quod si neque tradidissent neque emptor in mora fuisset, quominus traderentur, venditoris periculum erit*, D. 18, 6, 14. See further Moyle, Contract of Sale, *Periculum et Commodum rei*, 76. In the case of the theft of a deposit, the depositarius was not liable, not because he was not negligent, but "*quia, qui negligentis amico rem custodiendam tradit, suae facilitati id imputare debet*," Inst. 3, 14, 3. But this, unless exceptionally, is as noted above, not the English law. Ante, 893 n. 1, 896.

⁴ *Finncane v. Small*, 1 Esp. (N.P.) 315.

⁵ *Story*, Bailm. §§ 27 et seqq., 333-338; *Jones*, Bailm. 75 et seqq.; *Vere v. Smith*, 1 Ventr. 121. See *Clarke v. Earnshaw, Gow* (N.P.C.) 30; in a note to which the cases are considered; also, 1 Bell, Comm. (7th ed.) 498. The robbery by burglars of securities deposited for safe keeping in the vaults of a bank is no proof of negligence on the part of the bank: *Wylie v. Northampton Bank*, 119 U. S. (12 Davis) 361.

⁶ *Schmidt v. Blood*, 9 Wend. (N.Y.) 268.

finding will exculpate the bailee, unless they find further that he has not exercised ordinary care.¹

Where a man accepts goods to keep as his own he is not thereby made responsible for losses by theft.
Ground of this.

Where, then, a man accepts goods to keep as his own, he is not thereby made responsible for losses by theft. The modern law bases this principle, not upon a doctrine applicable to the general law of deposit, but on a special undertaking. The distinction, says Story,² may become of importance where the bailee is notoriously very careless and indifferent about his own affairs, in which case the depositor may fairly be presumed to know his habits and to trust to such care as the bailee takes of his own goods. If the goods are to be kept in a particular place, the depositor is not admitted to object that the place is not a safe one, since his assent amounts to a special agreement with reference to the place of their deposit.

The old law as it referred to robbery.

The old English law, as we have noted, held the bailee liable in all cases, because he was bound to make good the loss to the person who trusted him. In the case of robbery, there was some vacillation as to the liability of the bailee, probably either because there was no remedy over when the robber was unknown;³ or because, by reason of the felony, the bailee could not go against either the robber's body, which was hanged, or his estate, which was forfeited.⁴ Thus, in Y. B. 9 Ed. IV.,⁵ Danby says: "If a bailee receives goods to keep as his proper goods, then robbery shall excuse him, otherwise not." In Y. B. 10 H. VII.,⁶ robbery is not allowed to be an excuse.

Theft.

In the case of an ordinary theft the bailee was unquestionably liable to answer for goods stolen. "If the goods are taken by a trespasser, of whom the bailee has conusance, he shall be chargeable to his bailor, and shall have his action over against his trespasser."

Steinman v. Angier Line.

A very modern decision establishes the proposition that where goods are confided to one as a carrier, theft of them does not relieve the carrier of his liability, even if there be no specific negligence on his part; for a carrier is an insurer. "The broad principle of commercial law," says Bowen, L.J.,⁷ "always was and is that the

¹ Woodruff v. Painter, 150 Pa. St. 91, 30 Am. St. R. 786.

² Bailm. §§ 65, 66, 73.

³ Y. B. 33 H. VI., 1, pl. 3.

⁴ Y. B. 6 H. VII. 11, pl. 9 at 12. See the law discussed in Bentley v. Vilmonit, 12 App. Cas. 471; see also The Larceny Act, 1861 (24 & 25 Vict. c. 96) s. 100; and ante 880 n. 4.

⁵ Y. B. 9 E. IV. 40, pl. 22. "*Si l'eux receiver par gard sicome il gard ses propres biens, donques il excusera, ou outerment nemy.*" This, however, was merely said in argument by counsel. See per Holt, C.J., Coggs v. Bernard, 2 Ld. Raym. 909, at 914. Yet even an argument from counsel of such position (Danby had been Chief Justice) goes to shew that at best the law was not clear in the contrary sense.

⁶ Y. B. 10 H. VII. 25, pl. 3 at 26.

⁷ Y. B. 3 H. VII. 4, pl. 16, referred to at the end of the report in the preceding case. Holmes, The Common Law, 178.

⁸ Steinman v. Angier Line (1891), 1 Q. B. 619 at 621. Bowen, L.J.'s, judgment should be referred to for the history of the law.

ship, in the absence of express provision to the contrary, was liable to the cargo-owner for losses occasioned by theft committed on board. This idea was of cardinal moment, both in the law of insurance and in the law of carriers;" and this expression he fortifies with abundant authority from writers on the general mercantile law.

Under this head, too, Story¹ treats the question, whether a depositary is responsible for the loss of articles contained in a package the contents of which are unknown to him. This seems to have been a debated question amongst the Roman lawyers. In Southcote's Case,² it is said: "If A delivers to B A chest locked to keep, and he himself carries away the key, in that case, if the goods are stolen, B shall not be charged, for A did not trust B with them, nor did B undertake to keep them." This refers to Bonion's case;³ yet Holt, C.J., in *Coggs v. Bernard*,⁴ denies that the chest makes any difference; though the older authorities agree that there is no delivery if the goods are under lock and key.⁵ In our law the author of the "Commentaries on the Law of Bailments"⁶ says the question admits of different determinations according to circumstances. The minimum of the depositary's responsibility he marks as going "at least to the extent of what he might fairly presume to be the value of the contents."

How far a depositary is responsible for the loss of articles contained in a package whose contents are unknown to him.

(1) If the bailee knows that the box or casket contains jewels, although the bailor takes away the key, he is bound to a degree of diligence proportioned to the preciousness of the contents.⁷ Story's Propositions.

(2) If he has no ground to suppose that the box or casket contains valuables, he is bound only to such reasonable care as is required of depositaries in cases of articles of common value.⁷

(3) If there be meditated concealment of the contents of the box or casket from the bailee with a view to induce him to receive the bailment, and he would not have received it or have exposed it if he had been made acquainted with the facts, then the transaction will be deemed either a fraud on him or the loss will be set down to the bailor's own folly.⁸

¹ Bailm. § 75.

² 4 Co. Rep. 83, 84 a.

³ Y. B. 8 E. II. 275.

⁴ 2 Ld. Raym. 909, at 914. "I cannot see the reason of that difference, nor why the bailee should not be charged with goods in a chest, as well as with goods out of a chest. For the bailee has as little power over them when they are out of a chest as to any benefit he might have by them, as when they are in a chest; and he has as great power to defend them in one case as in the other."

⁵ Holmes, The Common Law, 176.

⁶ § 77.

⁷ Jones, Bailm. 38, 39; *Coggs v. Bernard*, 2 Ld. Raym. 909, 914, 915, 1 Sm. L. C. (9th ed.) 201.

⁸ *Batson v. Donovan*, 5 B. & Ald. 21; *Sleat v. Fagg*, 5 B. & Ald. 342. See per. Cave, J., *The Queen v. Ashwell*, 16 Q. B. D. 190, at 203. As to the effect of this case, see *The Queen v. Flowers*, 16 Q. B. D. 643.

The special agreement that the depositary makes may either narrow or enlarge his general responsibility; subject to the exception that an agreement not to take exception to fraud is void as being contrary to good morals and decency.¹

Second exception : Where one solicits the custody of goods.

Second : Sir William Jones's second exception is that when a man spontaneously and officiously proposes to keep the goods of another he may prevent the owner from entrusting them to a person of more approved vigilance; for which reason he takes upon himself the risk of the deposit, and becomes responsible at least for ordinary neglect, though not for mere casualties.² For this says Story,³ the writer does not cite any other authority than the Roman law. "The rule is certainly *strictissimi juris*; and the incorporation into our law ought not readily to be admitted. A voluntary offer of kindness to a friend, even when importunately urged, ought hardly to carry with it such penal consequences; since it is generally the result of strong affection, and a desire to oblige, and often of a sense of duty, especially in cases of imminent peril or sudden emergency."⁴

Third exception : Where there is reward.

Third : The third exception is, when the bailee either directly demands and receives a reward for his care or takes the charge of goods in consequence of some lucrative contract.⁵ Either of these circumstances changes the nature of the bailment from being a gratuitous deposit, and brings it under different considerations, where the depositary is held to ordinary care and is answerable for ordinary neglect.

Fourth exception : Where the benefit is the bailee's alone.

Fourth : The fourth exception is where the bailee alone receives advantage from the deposit. As to this Sir William Jones says : "This bailment, indeed, is rather a loan than a deposit," and "such a depositary must answer even for slight negligence."⁶

Where one finds property.

The legal effect of being in possession of another person's property by finding it must not be passed over unnoticed. As to

¹ Jones, Bailm. 48, citing Doctor and Student, dial. 2, c. 38. *Non valere, si con- venerit, ne olus prestetur* : Dig. 50, 17, 23.

² This is undoubtedly the rule of the civil law : Dig. 16, 3, 1, § 35; 1 Domat, Bk. 1. tit. 7, § 3. art. 8; Pothier, *Traité du Contrat de Dépôt*, n. 30, 31, 32. (Sir William Jones's four exceptions now being noted are derived from this passage of Pothier.) The Code Civil, arts. 1927, 1928, provides that the depositary must employ on the thing deposited the same care which he employs in the preservation of his own property. This rule is to be more rigorously applied : 1. if the depositary has volunteered to receive the deposit. 2. If he has contracted for payment for the custody of it. 3. If the deposit was made solely for the depositary's benefit. 4. If there is an agreement that the depositary is to be at the risk of mishaps. ³ Bailm. § 81.

⁴ Story, Bailm. § 82. Under this heading, Sir William Jones discusses the case of things deposited through necessity on any sudden emergency, as a fire or a shipwreck. "I can hardly persuade myself," he says (Bailm. 49), "that more than perfect faith is demanded in this case." *Ante*, 892. For the liability of a *negotiorum gestor* see *post*, 928 n.

⁵ Bailm. 49.

⁶ Bailm. 50.

this, in Bacon's Abridgement it is laid down : " If a man find goods and abuse them, or if he find sheep and kill them, this is a conversion ; but if a man find butter, and by his negligent keeping it putrefy ; or if a man find garments, and by negligent keeping they be moth-eaten, no action lies ; so it is if a man find goods and lose them again ; and the reason of the difference is this : where a man delivers goods to another, the bailee by acceptance of the goods undertakes for the safe custody of them, and it is to be presumed that the owner would not have parted with them but under confidence of that security ; but where a man only finds the goods of another the owner did not part with them under the caution of any trust or engagement, nor did the finder receive them into his possession under any obligation ; and therefore the law only prohibits a man in this case from making an unjust profit of what is another's ; but the finder is not obliged to preserve those goods safer than the owner himself did ; for there is no reason for the law to lay such a duty on the finder in behalf of the careless owner, and it seems too rigorous to extend the charity of the finder beyond the diligence of the proprietor ; it is, therefore, a good mean to punish an injurious act, viz., the conversion of the goods to his own use, but not to punish a negligence in him, when the owner is guilty of a much greater one."¹

Doctrine in
Bacon's
Abridgement.

This doctrine Story² criticizes as " very unsatisfactory," and cites the opinion of Coke, C.J., in *Isaack v. Clark* :³ " If a man finds goods, an action on the case lieth for his ill and negligent keeping of them, but no trover and conversion, because this is but a nonfeasance ;" whose doctrine he approves. It is, moreover, in consonance with what is said in Doctor and Student :⁴ " If a

Criticized by
Story.

Coke, C.J.,
in *Isaack v.*
Clark.

Doctor and
Student.

¹ Bac. Abr. Bailm. (D) 517 In *Mosgrave v. Agden*, Owen 141. the Court of Common Pleas held, in an action for the conversion of six barrels of butter, that an action would not lie ; " for he who finds goods is not bound to preserve them from putrefaction." If, however, " the goods were used, and by usage made worse, the action would lie."

² Bailm. § 86.

³ 2 Bulst. 306, at 312.

⁴ Dial. 2, c. 38. In *Hollins v. Fowler*, L. R. 7 H. L. 757, at 760, Blackburn, J., citing *Isaack v. Clark*, says that a refusal to deliver goods to a person who, having a *bond fide* doubt as to the title, detains them for a reasonable time for clearing up that doubt, is not a conversion. A demand and refusal is always evidence of a conversion. *Fouldes v. Willoughby*, 8 M. & W. 540 ; *Cp. Scattergood v. Sylvester*, 15 Q. B. 506 ; *Walker v. Matthews*, 8 Q. B. D. 109 ; *Com. Dig. Action upon the Case upon Trover* ; Bac. Abr. Trover ; *Bigelow, L. C.*, on Torts, 388-453. See *Merry v. Green*, 7 M. & W. 623, for circumstances where a finding may amount to larceny. This was the case of discovering a purse in a secret drawer of a bureau purchased at a public auction. *Cp. Regina v. Thurborn*, 1 Den. C. C. 387 ; 1 Whart. Crim. Law, §§ 901-913, and *ante* 902 n.⁴. As to lost property and the rights of a finder, *Bridges v. Hawkesworth*, 21 L. J. Q. B. 75 ; *Deaderick v. Oulds*, 6 Am. St. R. 812. The same reasonable care is required in the case of goods coming to one's possession by finding, as in the case of a gratuitous deposit : 2 Kent, Comm. 568. This is otherwise in Massachusetts : *M'Avoy v. Medina*, 93 Mass. 548, the head-note of which case is " a stranger in a shop who first sees a pocket-book which has been accidentally left by another upon a table there is authorized to take and hold possession of it, as against the shopkeeper." See also *Webb v. Fox*, 7 T. R. 391 ; *Giles v. Grover*, 9 Bing. 128, 6 Bligh N. S. 277, 1 Cl. & F. 72. The

man finds goods of another, if they be after hurt or lost by wilful negligence, he shall be charged to the owner. But if they be lost by other casualty, as if they be laid in a house that by chance is burned, or if he deliver them to another to keep that runneth away with them, I think he be discharged."

Story's
conclusion.

The conclusion Story arrives at is:¹ "There seems no just foundation in our law for any distinction as to responsibility, although there may be as to remedy, between cases of conversion and misfeasance by the finder of goods and cases of negligence, if the loss has arisen from that degree of negligence for which gratuitous bailees would ordinarily be liable."²

Nicholson v.
Chapman.

The same very learned writer is of opinion that the finder may charge the owner for necessary expense and labour in the care of what is found, which he terms salvage.³ This, however, has never been expressly decided. The nearest case in our reports is that of *Nicholson v. Chapman*,⁴ where some timber belonging to the plaintiff was placed in a dock on the bank of a navigable river, and, being accidentally loosened, was carried some considerable distance by the tide, and left on a tow-path at low water. Here it was found by the defendant, who voluntarily took it to a safe place out of reach of the tide. When the plaintiff afterwards demanded the timber the defendant refused to give it up without payment for what had been done. In an action of trover it was held that the defendant had no lien. Eyre, C.J., considered that the defendant might recover for his trouble and expense in some other form of action. There is a note to the report: "It seems probable that in such a case, if any action could be maintained, it would be an action of assumpsit for work and labour, in which the Court would imply a special instance and request as well as a promise. On a *quantum meruit* the reasonable extent of the recompense would come properly before the jury."⁵ If the loser of

common law has been trenced upon in London by 2 & 3 Vict. c. 71, s. 29. *King v. Milsom*, 2 Camp. 5, states the rule as to negotiable instruments, and that the *onus* is on defendant alleging that the note sued on is his property; and see *Lawson v. Weston*, 4 Esp. (N.P.) 56, 2 Kent, Comm. 356-357 n. (a), as to finder of a chose in action, e.g., a cheque. *Si prædo vel fur deposuerint, et hos Marcellus libro sexto digestorum putat recte depositi acturos*: Dig. 16, 3, 1, § 39. The law has been much discussed in America. The authorities are collected in *Sovern v. Yoran*, 8 Am. St. R. 293, and the note at 300.

¹ Bailm. § 87.

² Chancellor Kent (2 Comm. 569) is of the same opinion. See *M'Leod v. Jones*, 105 Mass. 403.

³ Bailm. § 121 a.

⁴ 2 H. Bl. 254; *Sutton v. Buck*, 2 Taunt. 302. In *Hingston v. Wendt*, 1 Q. B. D. 367, there was a putting of the plaintiff in possession by the captain. Eyre, C.J.'s, distinction between the saving of the goods by the plaintiff, in *Nicholson v. Chapman*, and salvage, is adopted by Lord Blackburn in *Aitchison v. Lohre*, 4 App. Cas. 755-760; see also 2 Kent, Comm. 636.

⁵ See *Baker v. Hoag*, 3 Barb. (N.Y.) 203, 7 Barb. (N.Y.) 113. In the American case of *Bartholomew v. Jackson*, 20 Johns. (Sup. Ct. N.Y.) 28, the point was raised. The action was on an assumpsit. J. owned a wheat stubble field in which B. had a stack of wheat,

a chattel offer a reward for its restoration a lien is thereby created to the extent of the reward.¹

This seems a convenient place to notice a case of *Howard v. Harris*,² tried before Watkin Williams, J., and which, as reported, it is difficult to assign to any just principle. The defendant, the manager of Drury Lane Theatre, received a letter from the plaintiff, stating that he had written a play, which he asked the defendant to assist him to produce. The defendant replied that if the plaintiff would send him the scene, plot, and sketch of the play he would look through it. According, the plaintiff sent the scene, plot, and sketch, and also the play itself. The plaintiff made numerous applications with reference to the play from time to time, and at last demanded its return; but it was not returned, as it could not be found. An action for the return of the play was then brought. The report goes on as follows: "Williams, J., held that there was no case to go to the jury, for the plaintiff had chosen voluntarily to send to the defendant what the defendant had never asked for, and no duty of any sort or kind was cast upon the defendant with regard to what was so sent."³

If this judgment be correct, the whole law of deposit must be wrong. As soon as the defendant received the deposit he became amenable to the rules of law regulating deposit: he was bound to slight diligence; he became liable for gross negligence,

which he promised to remove in time to prepare the ground for the full crop. When the time for removal came, J. sent a message to B. requesting the immediate removal of the stack. The sons of B. said it should be removed by ten o'clock the next morning. At that hour J. set fire to the stubble. The fire threatening to burn the stack, which B. and his sons neglected to remove, J. set to work and removed it himself so as to secure it for B. The Court held J. not entitled to recover for the work and labour in its removal. "If" said the Court, "a man humanely bestows his labour, and even risks his life, in voluntarily aiding to preserve his neighbour's house from destruction by fire, the law considers the service rendered as *gratuitous*, and it therefore forms no ground of action." In the argument in *Falcke v. Scottish Imperial Insurance Company*, 34 Ch. Div. 234, at 239, it was said: "If a party adopts and enjoys the benefit of what has been done by another person, his request will be presumed"; upon which Bowen, L.J., is reported to have made the comment, "The law is so laid down in Smith's Leading Cases in the notes to *Lampleigh v. Brathwait* (8th ed. vol. 1. 158), but it seems to be stated too widely. If that were the law, salvage would prevail at common law as well as in maritime law, which it certainly does not." This is also the opinion of Chancellor Kent, 2 Comm. 356, n. (e): "I beg leave to say that it appears to me that such findings have no analogy in principle to the cases of hazardous and meritorious sea or coast salvage under the Admiralty law, and that the rule of the common law as illustrated by Chief-Justice Eyre in *Nicholson v. Chapman*, as to these mere land-findings is the better policy." See, also, per Bowen, L.J., at 249, cited by Stirling, J., in *Blyth v. Fladgate* (1891), 1 Ch. 337, at 358.

¹ *Wentworth v. Day*, 44 Mass. 352.

² *Cababé & Ellis*, 253.

³ See per Holroyd, J., in *Batson v. Donovan*, 4 B. & Ald. 21, at 34, "In my opinion, the carrier cannot be considered as having consented to receive and carry these articles, by reason of the notice which he had given and his ignorance of their quality. I think, therefore, he is not answerable as a carrier, nor even as a bailee, on account of the legal fraud of which the plaintiffs were guilty. . . . The second question is, whether there was gross negligence on the part of the defendants. I think that question was properly left to the jury." See per Cave, J., *The Queen v. Ashwell*, 16 Q. B. D. 190, at 203.

Actual ruling
of the judge
probably not
as reported.

He might have avoided liability by a refusal to accept, by absolutely ignoring the thing sent, or by immediately returning it. In the event of his acquiescing in the receipt, he could not be regarded as in any better position than a finder of the play, who, as we have seen, would have his choice to pass it by or to take it up; in the latter event he would be required to answer for gross negligence. From the report it appears that the evidence went no further than to prove a loss by the depositary. The ruling of Watkin Williams, J., then, probably was that loss without something to shew the circumstances, is not evidence to leave to the jury in a case where nothing less than gross negligence would affix liability.¹ Moreover, the action was in trover for the recovery of the manuscript. In this form of action proof of demand and refusal constitutes an apparent conversion, and throws upon the defendant the burden of shewing that the property was lost or stolen.² It was probably admitted that the property was lost. The *onus* in these circumstances on the plaintiff was to shew the circumstances which point the negligence; since, in the words of the editor of the eighth edition of Story,³ "mere proof of loss or injury to goods while in the hands of a bailee does not, *per se*, prove negligence in him. It may do so, or may not, according to the attending circumstances; but it is the circumstances which shew the negligence, not the mere loss or absence of the property. Evidence, therefore, that the goods are missing, that they are not on hand when called for, does not, in and of itself, establish negligence in the bailee. The bailor must shew that fact *affirmatively* that the bailee has done something or omitted to do something which he ought not to have done or omitted."⁴

¹ See *Tobin v. Murison*, 5 Moo. P. C. C. 110; *Tompkins v. Saltmarsh*, 14 Ser. & Rawle (Pa.), 275. As to an involuntary bailee, *Hough v. London and North-Western Railway Company*, L. R. 5 Ex. 51. Where defendant indorsed an order enabling one acting as broker for a third person and consigning to defendant goods by mistake, to possess himself of the goods and to deal with them in fraud of his principal, defendant was held liable for a conversion in having indorsed the order without occasion or authority to do so: *Hiorl v. Bott*, L. R. 9 Ex. 86.

² *Cranch v. White*, 1 Bing. N. C. 414. Story, Bailm. § 107. In assumpsit or case founded on negligence the plaintiff must in the first instance make out his case as he charges it.

³ Bailm. § 410 a, citing as his authorities *Gilbart v. Dale*, 5 A. & E. 543, and *Midland Railway Company v. Bromley*, 17 C. B. 372.

⁴ In *Smith v. First National Bank of Westfield*, 99 Mass. 605, it was held that, to charge defendants for negligence in a case of gratuitous bailments, something must be shewn affirmatively beyond that the package could not be found; and this was followed in *Pitlock v. Wells*, 109 Mass. 452, at 456. The Queen's Bench Division decided the same point the same way in *Powell v. Graves*, 2 Times L. R. 663, where plaintiff deposited a picture, which was kept by defendants gratuitously; after three years, on his asking for it, it could not be found. Lord Coleridge said: "There must be affirmative evidence of negligence to make them [*i.e.*, the defendants], as gratuitous bailees, liable for the loss."

⁵ *Cotton v. Wood*, 8 C. B. N. S. 568; *Welfare v. London, Brighton, and South.*

Where there is a positive act of gross carelessness in regard to a gratuitous bailment the bailee will be held liable. Thus, where a gratuitous bailee—an innkeeper who took charge of luggage the property of one who had been staying at his house and who had paid his bill, given up his rooms and left—parted with the luggage he held as gratuitous bailee to an apparent stranger without an effort to verify his claim to it and without inquiry as to the ownership, he was held liable to the owner for the full value of the property he so recklessly parted with.¹ On the other hand, in an English case,² where one lent a picture to another, who, wanting to shew it to a third, sent it to the house of the third person without apprising him of his intention, where it was injured, such third person was held not liable, since he could not be made a bailee without his own consent. This case was cited in *Neuwirk v. The Over Darwen Industrial Co-operative Society*,³ where plaintiff left a valuable double-bass violin in a room attached to a hall where he had been rehearsing for a musical performance, and in which it appeared to be not unusual for the musicians performing at the hall to leave their instruments. When he went for it in the evening he found it broken. In an action for the negligent custody, it was held that the leaving the violin in the room did not constitute a bailment, and was “no evidence that it was entrusted to the care of any one, or that the owner was not quite content to leave it there at his own risk.”

In the case of money deposited with a banker, the bank is not bound to restore the same money, but only an equivalent sum whenever it is demanded.⁴ This transaction does not, therefore, come up for examination in the present connection, and the consideration of it will be dealt with subsequently.

Persons are sometimes in the habit of making a special deposit at a bank of plate or jewels or title-deeds, or even of coin or monetary securities, where the very thing deposited is to be restored, and not an equivalent.⁵

Coast Railway Company, L. R. 4 Q. B. 693. See *contra*, *Mackenzie v. Cox*, 9 C. & P. 632.

¹ *Wear v. Gleason*, 20 Am. St. R. 186. The distinction between neglecting to act, and acting negligently in the case of a gratuitous bailment, is brought out by *Wright, J.*, in *Turner v. Merriells*, 8 Times L. R. 695.

² *Lethbridge v. Phillips*, 2 Stark. (N.P.) 544. In *Shelbury v. Scotsford*, Yelv. 23, it was held that if a horse be taken *vi et armis et contra voluntatem* from a bailee of one not the owner by the owner, the depositary is not responsible to his bailor. *Post*, 918.

³ 10 Times L. R. 282.

⁴ *Foley v. Hill*, 2 H. L. C. 28, at 36. *Post*, Bankers.

⁵ In the Roman law, if money, unsecured by being locked up or otherwise placed in safety, were deposited, it was regarded as a *depositum irregulare*—*nam si quis pecuniam numeratam ita deposuisset, ut neque clausam neque obsequatam traderet, sed adnumeraret, nihil aliud cum debere, apud quem deposita esset, nisi tantundem pecunie solveret*. D. 19, 2, 31.

Giblin v.
M'Mullen.

The law on this subject is declared in *Giblin v. M'Mullen*,¹ in the Privy Council. A customer placed in the care of a bank certain railway debentures, which were kept in a box (of which the customer kept the key) in the strong room of the bank with the boxes of other customers. Access to this room was obtainable only by passing through a compartment where a cashier sat by day and a messenger slept at night, and other precautions were adopted. The owner of the box had free access to the room where his box was deposited during banking hours, in the presence of one of the bank clerks, when he had occasion to take coupons from his debentures for collection. While in such custody the cashier of the bank abstracted the debentures from the box and made away with them. The plaintiff had a verdict at the trial; but a rule to enter a nonsuit was made absolute by the full Court, and was upheld on appeal, on the ground² that "It is clear, according to the authorities, that the bank in this case were not bound to more than ordinary care of the deposit entrusted to them, and that the negligence for which alone they could be made liable would have been the want of that ordinary diligence which men of common prudence generally exercise about their own affairs."

Rule of
diligence.

Foster v. Essex
Bank.

The American case of *Foster v. Essex Bank*³ was referred to with approbation. There the plaintiff deposited with the bank for safe custody a cask containing a quantity of gold doubloons, which were placed in a vault of the bank, where the agent of the plaintiff was in the habit of coming to see that they were safe. The cashier and chief clerk of the bank fraudulently abstracted some of the contents of the cask and absconded. The plaintiff having brought his action, was held disentitled to recover, on the ground that "such deposits are, indeed, simply gratuitous on the part of the bank, and the practice of receiving them must have originated in a willingness to accommodate members of the corporation with a place for their treasures more secure from fire and thieves than their dwelling-houses or stores." "The rule to be applied to this species of bailment is, as has been stated, that the depositary is answerable in case of loss for gross negligence only, or fraud, which will make a bailee of any character answerable. Gross negligence certainly cannot be inferred from anything found by the verdict; for *the same care was taken of this as of other deposits, and of the property belonging to the bank itself*."⁴

¹ L. R. 2 P. C. 317.

² L. c. at 337.

³ 17 Mass. 479. A similar case is *Scott v. National Bank of Chester Valley*, 72 Pa. St. 472. "We think it well settled that a bailee for safe keeping, without reward, is not responsible for the article deposited, without proof that the loss was occasioned by bad faith, or gross negligence": per Shaw, C.J., *Whitney v. Lee*, 49 Mass. 91, at 93. See also *Brown v. National Bank of Australasia*, 16 Vict. L. R. 475.

⁴ 17 Mass. at 507.

On a cursory examination, there seems a discrepancy in the decision arrived at in these two very similar cases. In Giblin's case the degree of care is specified as "not more than ordinary," and the negligence, for which alone the defendants could be made liable, as "the want of that ordinary intelligence which men of common prudence generally exercise about their own affairs." This is almost the very wording of Sir William Jones's definition of ordinary negligence.¹ In Foster's case the defendants are stated to be answerable "for gross negligence only or fraud."

The test applied, however, seems to be whether "the same care was taken of this as of other deposits and of the property belonging to the bank itself."² In Giblin's case the degree of care, in Foster's case the want of care, is the more prominent notion, and want of ordinary care is gross negligence.³ In considering the character of the deposit again, a far greater amount of care is required to be exercised in the guarding of precious articles than if the deposit were of iron or tin.⁴ A man careful, attentive, and intelligent in the management of his own affairs would exercise very considerable caution in the care of bank-notes or bullion. Gross negligence⁵ in matters of this kind is any intermission of that ordinary prudence which men generally exercise upon their own affairs, and the prudence they generally exercise is absolutely a very considerable amount, though relatively to the particular matter, it is only ordinary care; and thus the apparent discrepancy again resolves itself into an identical expression.

The United States case of *National Bank v. Graham*⁶ appears to favour a stricter rule. A customer of a bank deposited bonds there for safe keeping, in accordance with a common practice between bankers and their customers, for which accommodation no compensation was expected or received by the bank. The bonds were stolen. On action brought the jury were told that to justify a recovery against the bank they must be satisfied that the plaintiff's bonds were received for safe keeping with the knowledge and acquiescence of the officers and directors of the bank (this was with reference to a point that the deposit

¹ Bailm. 118.

² The rule of *negligence crasse*, adopted by Pothier, *Traité du Contrat de Dépôt*, n. 27, from the civil law, is *Nec enim salvâ fide minorem iis, quam suis rebus, diligentiam præstabit*. D. 16, 3, 32.

³ Cp. Jones, Bailm. 118; Story, Bailm. § 17. *Ante*, 49.

⁴ *Mytton v. Cock*, 2 Str. 1099, *ante*, 894.

⁵ *Latæ culpæ finis est non intelligere id quod omnes intelligunt*, cited by Wharton, *Negligence* (2nd ed.), § 468, as the definition of gross negligence in the civil law. "Gross neglect," says Chancellor Kent (2 Comm. 560), quoting Parker, C.J., in Foster's case, 17 Mass. 479, at 499, "is the want of that care which every man of common-sense under the circumstances takes of his own affairs."

⁶ 100 U. S. (10 Otto) 699. The judgment is also set out in the note (at 592) to *Pattison v. Syracuse National Bank*, 36 Am. R. 582, a case itself deserving perusal.

Swayne, J.'s
judgment.

was *ultra vires* of the bank), and if they were lost by the gross negligence of the bank or its officers the bank was liable. The jury found knowledge on the part of the officers, and also gross negligence. On the appeal to the Supreme Court, Swayne, J., said:¹ "It is now well settled that if a bank be accustomed to take such deposits as the one here in question, and this is known and acquiesced in by the directors, and the property deposited is lost by the gross carelessness of the bailee, a liability ensues in like manner as if the deposit had been authorized by the terms of the charter." The case would at first sight seem to warrant a deduction that, where goods are lost by theft when gratuitously bailed, the bailee becomes chargeable for gross negligence. This is not so; for the Court was concluded by the finding that in the case in question there was gross negligence; the point whether the jury was sufficiently instructed as to what constituted gross negligence in a gratuitous bailee was not raised, and the adequacy of the instruction appears to have been accepted. Taken in connection with what has gone before,² it may be affirmed that the general proposition that theft raises an implication of negligence against a gratuitous bailee is misleading; the utmost that can be said is that there may be cases where it does; and in the case now under consideration there was no means of disputing the proposition as limited to its special circumstances.

Manhattan
Bank v.
Walker.

In the later case of *Manhattan Bank v. Walker*³ the existence of gross negligence was denied because it was contended the relation of the parties failed to raise a legal duty. The facts shewed that a bank gave a receipt stating that A as agent for B had placed certain bonds on deposit with them and sent the same on the request of A direct to B making an entry in their books at the time to the same effect. Subsequently the bank permitted A to deal with the securities and he misapplied them. B thereupon sued the bank, who disputed the existence of any relationship of bailor and bailee between themselves and B. The execution of the receipt and the transmission to the plaintiff was nevertheless held to create the relation of bailor and bailee between the plaintiff and the bank, and, that being established, it was clearly gross negligence for the bank to deliver or dispose of or appropriate the securities without the authority of their bailor.

Preston v.
Prather.

Preston v. Prather,⁴ again, is a case where bankers were held liable for the loss of bonds deposited with them as gratuitous

¹ 100 U. S. (10 Otto) at 702.

² *Ante*, 901.

³ 130 U. S. (23 Davis) 267.

⁴ 137 U. S. (30 Davis) 604, followed in *Briggs v. Spaulding*, 141 U. S. (34 Davis) 132, at 150.

bailors. They were informed that their assistant cashier, who had free access to the vaults where the bonds were deposited, and who was a person of slender means, was speculating in stocks; notwithstanding this intimation, they neglected any precautions, and neither examined their securities nor removed their cashier. Ultimately he stole the bonds, and the bankers were rightly held liable. Their duty was described as being to keep the securities "right as against burglars outside and from thieves within."¹ Though the decision in the present case is unimpeachable, the statement of the duty on the bankers is put somewhat too broadly, if the considerations already pointed out are just.² The utmost that can be said in the view already indicated is that in the circumstances it was their duty to protect the bonds against the thief.

*Giblin v. M'Mullen*³ was considered and distinguished in *In re United Service Company*, Johnston's claim.⁴ The owner of railway shares in two companies deposited the certificates for safe custody with a banking company, who undertook to receive the dividends for a small commission. On receiving certificates from the railway companies, J gave his address in one instance at the office of the bank, and in the other at a club. The manager of the bank, who had the key of the safe where the certificates were kept, fraudulently sold the shares, and forged the name of J. to the transfer. The companies wrote to J, informing him of the transfers, and in one instance received no answer, and in another an answer in J's name, forged by the manager. They thereupon registered the transfer. The case came before the Court on a point relating to the disallowing of costs on account of remoteness of damage. James, L.J., held the case clearly distinguishable from *Giblin v. M'Mullen*. There a box containing documents was placed at a bank simply for the purpose of convenient deposit, and the customer alone had access to it. In the present case the securities came into the custody of the bank in the ordinary course of their business as bankers, and so as to entitle the bank to a lien upon them for their general banking account, even though the possession of these particular documents was not essential to the collection of the money which the bank was authorized to collect. Further the leaving the securities in the uncontrolled and unwatched power of the manager was a gross neglect, neither excused nor justified by reason of the fact that the bank was equally negligent with its own securities.

Giblin v. M'Mullen distinguished
in *re United Service Company*
Ex parte Johnston.

¹ 137 U. S. (30 Davis) at 610.

² See *Wylie v. Northampton Bank*, 119 U. S. (12 Davis) 361.

³ L. R. 2 P. C. 317.

⁴ L. R. 6 Ch. 212. Cp. *Lancaster County National Bank v. Smith*, 62 Pa. St. 47, and *United Society of Shakers v. Underwood*, 15 Am. Rep. 731.

Gross
negligence.

This decision goes far to help in clearing up any remaining ambiguity in the application of the term "gross negligence." "Gross negligence," we have seen, first, marks a comparison between two classes of transactions—*e.g.*, the different amount of negligence which imports liability in the case of goods deposited and goods hired respectively. Secondly, as applied to a class, it has also a relative and not an absolute signification. Confining our attention to goods deposited exclusively, in which class "gross negligence" is required to be shewn before liability arises, there is yet a further distinction to be noted. In logical language, gross negligence is to be understood not *simpliciter*—not as an inelastic expression; but *secundum quid*—with certain limitations. The depositary, under the general rule, is not liable unless he has been guilty of gross negligence. Now gross negligence is not a formula establishing a standard, such as an imperial pint or a statute mile or a thermometrical degree; it is rather the indication of a proportion never varying between the subject-matter on which it is to be concerned and the degree of care to be taken with reference to it, yet varying between case and case just as the matter with which each is concerned varies and the circumstances in which each is placed.¹ The rule of law is fixed that a depositary is liable only for gross negligence. The cases we have been considering indicate that gross negligence is the absence of that care which is ordinarily to be expected from the average man; not, however, the average man absolutely taken, irrespectively of capacity and experience and forethought; but the average man with reference to the particular duties; and what the average man will do with reference to particular circumstances, is a fluctuating quantity, which has in each case to be determined. It is the determination of this within a wide range of possibilities that gives to the term "gross negligence" its apparent ambiguity—now bringing certain acts within its range, now excluding them, arbitrarily at first sight, yet really determined by two factors—first, the nature of the confidence bestowed; secondly, the subject-matter with reference to which the confidence is bestowed.

Nelson v.
Macintosh.

Nelson *v.* Macintosh² well illustrates how, the circumstances varying, different degrees of care may be exacted with regard to the very same articles. The action was for negligently carrying the plaintiff's box containing doubloons and other valuables, whereby they were lost. The plaintiff was to have worked his

¹ See the point admirably illustrated in Story, Bailm. § 11; Vaughan *v.* Menlove, 3 Bing. N. C. 468, at 475; Whitney *v.* Lee, 49 Mass. 91. "Gross negligence on the part of a gratuitous bailee, though not a fraud, is in legal effect the same thing," per Swayne, J., National Bank *v.* Graham, 100 U. S. (10 Otto) 699, at 702.

² 1 Stark. (N.P.) 227; cp. Tracy *v.* Wood, 3 Mason (U. S.) 132.

passage home on board a ship of which the defendant was captain ; in the result the ship sailed without him, having on board the plaintiff's box stowed on the quarter-deck. Towards the end of the voyage the captain opened the trunk, and the doubloons and valuables were put in a canvas bag, and deposited in the captain's chest in the cabin in which his own valuables were kept. When the vessel reached Gravesend, the captain and a mate left the vessel, and a river pilot and an excise officer came on board. Two young men of the vessel were allowed to sleep in the cabin. Next morning the captain's trunk containing the valuables was missing. Lord Ellenborough charged the jury that every person who delivers goods to another to be carried for hire has a right to the utmost care, and that when a person does not carry for hire he is bound to take proper and prudent care of that which is committed to him. This would have been the rule applicable in the first instance ; when, however, the captain opened the box, he became bound to replace it in its proper state of security, and to restore all the guards with which it had before been protected. The defendant's conduct exposed the property to peril and risk ; and the value of the property accordingly imposed on him an enhanced duty of vigilance that his acts might not operate to the prejudice of the party. When he had ascertained the valuable nature of the property, it was a duty imperative upon him to restore it to at least its former degree of security. Having taken it wholly out of the box, he was bound to make his own trunk, in which he chose to deposit it, as secure as possible ; since it was no longer the box of a seaman working his passage home that was being guarded, but an article of great value, which the defendant was bound to watch with great care and diligence. The act of the captain therefore greatly increased his responsibilities ; since he became from custodian of a seaman's chest the depositary of money and valuables. It is in this regard that gross negligence becomes a quantity so difficult to apportion.

The same point is also illustrated in *The Rendsberg*,¹ which came before the Court on objection to the report of the registrar on charges exhibited by the marshal of the court against the ship and cargo for services. Sir William Scott there says : " The commissioner employed is *pro hac vice* the servant of those who employ him. What is the obligation of a servant ? If I send a servant with money to a banker, and he carries it with proper care, he would not be answerable for the loss if his pocket was picked in the way ; but if, instead of carrying it in a proper manner and with ordinary caution, he should carry it openly in

*The
Rendsberg.*

Judgment of
Sir William
Scott.

¹ 6 C. Rob. (Adm.) 142, at 155.

his hand, thereby exposing valuable property so as to invite the snatch of any person he might meet in the crowded population of this town, he would be liable, because he would be guilty of the *negligentia maliciosa* in doing that, from which the law must infer that he intended the event which has actually taken place."

Principle enunciated by Sir William Scott a general one and not confined to deposit.

The case put by Sir William Scott comes under that division of bailments called *locatio operis*, and not specially under that of *depositum*, which is the direct subject of our present consideration. Still the principle involved runs through the whole law of bailments, and is true alike of *depositum* and *locatio operis mercium vehendarum*, of the least as well as of the most onerous of these relations. In discussing the matter in this place it must accordingly be clearly understood that the conclusions arrived at are not limited to the case of deposit, and are applicable in considering the relations that arise out of the law of bailments, throughout our examination of the subject.

Depositary no right to the use of thing deposited.
Two exceptions.

As a general proposition it is correct to say that the depositary has no right to use the thing deposited.¹ Yet this is subject to two exceptions—first, where the deposit requires use, as sporting dogs and horses;² secondly, where the keeping the deposit is a charge to the depositary, as in the case of a cow or a horse; there the pawnee may milk the cow and use the milk, and ride the horse, by way of recompense for the keeping.³

Assent of owner presumed where use benefits the deposit.

The best general rule on the subject, says Story,⁴ is to consider, whether there may, or may not, be an implied consent on the part of the owner to the use. If the use would be for the benefit of the deposit, the assent of the owner may well be presumed; if to his injury, or perilous, it ought not to be presumed; and if the use would be indifferent, and other circumstances do not incline either way, the use may be deemed not allowable.

Depositary no authority to sell or pledge.
Hartop v. Hoare.

It follows that the depositary has no authority to sell or pledge the deposit; and if he does, the owner may reclaim it from any person who is found in possession of it. This was held to be the law in *Hartop v. Hoare*,⁵ in which case certain jewels, sealed up, had been placed for safe custody in the hands of a jeweller, who broke the seal and pledged them. The owner brought an action of trover against the defendant, and the Court determined

¹ Dig. 16, 3, 29, *Si sacculum, vel argentum signatum deposuero, et is, penes quem depositum fuit, me invito contrectaverit, et depositi et furti actio mihi in eum competit. Cujus interfuit non subripi, is actionem furti habet*: D. 47, 2, 10. See also Gaius, 3, §§ 196–198; Pothier, *Traité du Contrat de Dépôt*, n. 34; Bac. Abr. Bailm. (D), Jones, Bailm. 81, 82.

² *Mores v. Conham*, Owen 123; *Anon.*, 2 Salk. 522.

³ Bac. Abr. Distress (D); Com. Dig. Distress (D 6).

⁴ Bailm. § 90.

⁵ 3 Atk. 44.

that the delivery of the jewels to the jeweller was a mere naked bailment for the use of the bailor, and that the jeweller was a mere depositary, with neither general nor special property in the jewels, and with the custody only, so that the rightful owner was entitled to recover. There could have been no recovery by the owner had the depositary himself had any property in the deposit, as in that case he would have transferred it, and the transferee would have been entitled to the possession; since there was no property, the transferee's holding was a mere conversion. *Hartop v. Hoare*, therefore, establishes that the interest of a depositary is no more than a rightful possession and custody without any right of property. This is in opposition to some earlier cases; ¹ while Blackstone also says ² that a bailee has "a special qualified property," and Sir William Jones ³ is of the same opinion. On the other hand, Coke, C.J., says, in *Isaack v. Clark*, ⁴ "Bailment makes a privity, if one hath goods as a bailee, where he hath only a possession and no property, yet he shall have an action for them." The same view is approved both by Story ⁵ and Kent; ⁶ and must be held that on which the balance of authority is, so long as the judgment of the King's Bench in *Hartop v. Hoare* is not judicially discredited.

Coke, C.J., in
Isaack v. Clark.

The rule as to a bailee's right of action whether with or without a property in the bailment is laid down in Bacon's Abridgement: ⁷ "Every bailee has a general right of action against mere wrongdoers to the property while in his possession; whether he has a special property therein or not, because he is answerable over to the bailor; for a man ought not to be charged with an injury to another without being able to resort to the original cause of that injury, and in amends there to do himself right."

Rule as stated
in Bacon's
Abridgement.

The depositary is bound to restore the deposit upon demand to the bailor from whom he received it, unless another person appears

Depositary
bound to
restore deposit,
unless the
rightful owner
claims it.

¹ *E.g.*, Y. B. 21 H. VII. 14 pl. 23, an action of replevin, where defendant pleaded property in a stranger, and plaintiff replied that the stranger had bailed the goods to him to re-deliver them to the stranger, but before the re-delivery the defendant took them. On demurrer judgment was given for the plaintiff. In replevin, however, an action will only lie where the party bringing the action has a general or a special property in the thing. See Am. Jur. vol. xvi. 280-285, where Story's view is controverted; *Miles v. Cattle*, 6 Bing. 743; Story, Bailm. note to § 93 e; *Burton v. Hughes*, 2 Bing. 173.

² 2 Comm. 452.

³ Bailm. 80.

⁴ 2 Bulst. 306, at 311.

⁵ Bailm. § 93 a *et seqq.*

⁶ 2 Comm. 568 n. (e).

⁷ Bailm. (D). In *Giles v. Grover*, 6 Bligh, N. S. 277, at 453, Lord Tenterden, C.J., moving the judgment of the House of Lords, says: "Any man in possession of goods, either as the bailee or otherwise, may, in his own name, maintain an action"; and Tindal, C.J. in the same case, at 436, says: "Any person who has the legal possession of goods, though not the property, may maintain his action against the wrongdoer; for a mere wrongdoer cannot dispute the title of the party who is in possession of the goods, without any colour of legal title." See also *Burton v. Hughes*, 2 Bing. 173.

to be the right owner,¹ yet he has a good defence against the bailor if the bailor has no valid title and he delivers the property bailed to the rightful owner.² When he delivers up the thing bailed it must be in the state in which he received it, and with the profit or increase which it has produced, for which he becomes

¹ 2 Kent, Comm. 567.

² *King v. Richards*, 6 Whar. (Pa.) 418; in this case the older English authorities, are carefully collected and analyzed in a most able judgment. See also *Wilson v. Anderton*, 1 B. & Ad. 450; *Ogle v. Atkinson*, 5 Taunt. 759. The bailee can only set up the title of another, "if he defends upon the right and title, and by the authority of that person," per Blackburn, J., in *Biddle v. Bond*, 6 B. & S. 225, at 234 (citing *Pollock, C.B.*, in *Thorne v. Tilbury*, 3 H. & N. 534, at 537), explained by Lord Selborne, C., in *Kingsman v. Kingsman*, 6 Q. B. Div. 122, at 129, distinguished in *Ex parte Davies, In re Sadler*, 19 Ch. Div. 86, at 93, per Lush, L.J., and approved *Rogers v. Lambert* (1891), 1 Q. B. 318. A bailee may, however, equally with a tenant, shew that the title of his bailor to the goods has expired since the bailment: *Thorne v. Tilbury*, 3 H. & N. 534. In *Roll. Abr. Detinue*, 6, citing *Y. B. 9 H. VI. 58, pl. 4*, it is laid down that if the bailee of goods deliver them to him who has the right thereto, he is still chargeable to the bailor; and the converse, if the bailee deliver to the bailor he is protected against the true owner, is also asserted, in the following passage, *Detinue* 7, on the authority of *Y. B. 7 H. VI. 22, pl. 3*. If ever law, this is no longer so. Where the true owner has by legal proceedings compelled a delivery to himself of the goods bailed, such delivery is a complete justification for non-delivery on account of the bailor; *Shelby v. Scotsford*, *Yelv.* 23; *Ogle v. Atkinson*, 5 Taunt. 759; *Watson v. Anderton*, 1 B. & Ad. 456, citing as to the bailee's right to interplead, *Com. Dig. Chancery* (3 T). An actual delivery to the true owner, having a right to the possession on his demand of them, is also a justification for the bailee: *Hardman v. Willcock*, 9 Bing. 382*n*; *Biddle v. Bond*, 6 B. & S. 225. A strong presumption in favour of the bailor arises from the bailment, though there is no absolute estoppel. The bailee's contract is to do with the property committed to him what his principal has directed, to restore it or to account for it (*Cheesman v. Exall*, 6 Ex. 341), and by yielding to title paramount he does account for it. If at any stage of the transaction the principles of estoppel are applicable, they cease to be so when the bailment is determined by what is equivalent to an eviction by title paramount, that is to say, by the reassertion of possession by the true owner: *Biddle v. Bond, supra*. It is true that it has sometimes been said that the bailee can only recognize the *jus tertii* where a legal decision has established it, or where fraud has been practised by the bailor as in the case of *Hardman v. Willcock, supra*. But the bailor himself cannot confer rights he is not possessed of, and if he cannot withhold possession from the true owner, neither can one claiming under him. The rule is that a bailee cannot avail himself of the *jus tertii* for the purpose of keeping the property for himself, even though the title he sets up is that of the true owner. If the law were otherwise, by such a pretext he might keep goods deposited with him without any pretence of ownership. If, however, the bailee has performed his legal duty by delivering the property to its true owner, at his demand, he is not answerable to the bailor, and there is no difference in this particular between a common carrier and other bailees: *The Idaho*, 93 U. S. (3 Otto) 575. See Mr. Holmes's note, *Duty to return*, 2 Kent, Comm. (12th ed.) 566; also 2 *Parsons, Contracts* (6th ed.), 94. In *Kohn v. Richmond and Danville Railroad Company*, 34 Am. St. R. 726, it was held that the bailor is not bound to deliver to the true owner, but is bound to yield to process of law, and is therefore excused for doing so. See an article, *Title to Chattels by Possession*, by Mr. J. F. Clerk, in *Law Quarterly Review* (1891), vol. vii. 224. Mr. Clerk considers that (1) Possessors guilty of conversion, (2) Possessors who are insurers, (3) Possessors guilty of negligence, may maintain an action for the full value of the property in their hands; but that where the person sued by a bare possessor shews who is the true owner, and that the possessor is not liable over to him, such bare possessor can recover no more than nominal damages; or if the possessor has a limited interest, as one with a lien, then in like circumstances he can only recover the amount of injury to his own interest. Mr. Clerk sums up his article by stating the following three propositions:

1. "Where the defendant is unable to shew who the true owner is (*e.g.*, in the case of the finder of goods, *Armory v. Delamirie*, 1 Str. 505), the bare possessor may recover the same measure of damages as he would be entitled to recover if he were the true owner, whether he is liable over to the owner or not.

2. "Where the true owner is shewn, the bare possessor cannot recover the value of goods taken or the diminution in their value if they be injured, unless he is liable over to the owner." Probably besides pointing to the true owner, it would be necessary to

liable if in default.¹ Where a third person intermeddles the rule is that either the bailor or the bailee may sue, and whichever first obtains damages does so in full satisfaction,² provided that the bailee is answerable over to the bailor.³

In the case of a joint deposit, the depositary is not in general bound to deliver the deposit without the consent of all the parties;⁴ and, on the other hand, Story says,⁵ that where there

shew that he had an available legal right. For instance, to point out a true owner who was barred by the Statute of Limitations would not do; possibly it also would not avail to indicate one gone on a voyage of Arctic discovery.

3. "Whether the true owner be shewn or not, the bare possessor may always recover damages for the taking or trespass, which damages will be substantial or nominal according as the taking or trespass is or is not attended with matter of aggravation." *Claridge v. South Staffordshire Tramway Company* (1892), 1 Q. B. 422, is only at first sight against this proposition. The County Court judge had entered damages for the injury to the carriage in that case for the plaintiff, and the question whether he was entitled to nominal damages did not arise. The sole contention was whether he was entitled to substantial damages. *Ante*, 887.

In *detinue* under the old pleading, the allegation of a bailment was not traversable, *Gledstane v. Hewitt*, 1 Cr. & J. 565; *Clossman v. White*, 7 C. B. 43, at 55. By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 49, this allegation must be omitted. This was repealed 46 & 47 Vict. c. 49, s. 3, but see s. 7. The gist of the action is the wrongful detention of goods, which makes it an action for a wrong independent of contract: *Gledstane v. Hewitt*, *supra*; see *Danby v. Lamb*, 11 C. B. N. S. 423. It is immaterial that the goods were in the first instance held lawfully: 1 Chitty, Plead. (7th ed.), 137. To maintain the action there must be a right to the immediate possession of the goods at the time of the issue of the writ: *Roberts v. Wyatt*, 2 Taunt. 268; *Halliday v. Holgate*, L. R. 3 Ex. 299, per Willes, J., at 302; and they must be ascertained and distinguishable. Thus money must be identified as in a bag, corn in a sack: 3 Bl. Comm. 152; cp. 2 Wms. Saund. 74 b. In an action of *detinue infancie* is no defence: *Burton v. Levey*, 7 Times L. R. 248.

¹ 2 Kent, Comm. 567, citing *Game v. Harvie*, Yelv. 50; *Coggs v. Bernard*, 2 Ld. Raym. 909.

² Per Parke, B., *Nicolls v. Bastard*, 2 C. M. & R. 659, at 660. *Si bailee del biens port trespass, et bailor auter trespass, cestuy que primerment recover oustera l'auter d'action*, 2 Roll. Abr. Trespass, 569, pl. 5, referring to Y. B. 48 E. III. 20, pl. 8, at 21, and Y. B. 20 H. VIII. 5, pl. 15, which was an action brought for battery of a servant, and where it was held that the battery is no tort to the master, but only the loss of service. *Pain v. Whittaker*, Ry. & M. (N. P.) 99. See *Gordon v. Harper*, 7 T. R. 9, at 12, and *Wibraham v. Snow*, 2 Wms. Saund. 47, a very mine of learning.

³ See *ante*, 886, 887.

⁴ *Harper v. Godsell*, L. R. 5 Q. B. 422; *Brandon v. Scott*, 7 E. & B. 234; *May v. Harvey*, 13 East 197; 2 Kent, Comm. 566. The point may be also illustrated by a passage from the life of Noy, prefixed to the edition of his *Maxims*, by Bythewood, of conveyancing fame, at viii.: "The first evidence of his (Noy's) splendid abilities, quickness of perception, and extensive research, was given in a cause, in which three graziers at a fair, had left their money with their hostess, while they went to the market; one of them returned, received the money, and absconded; the other two sued the woman for delivering what she received from the three, before they all came to demand it together. The cause was clearly against the woman, and judgment was ready to be pronounced, when Mr. Noy, not being employed in the cause, desired the woman to give him a fee, as he could not plead in her behalf unless he was employed, and having received it, he moved in arrest of judgment, that he was retained by the defendant, and that the case was this: the defendant had received the money from the three together, and was not to deliver it until the same three demanded it; that the money was ready to be paid, whenever the three men should demand it together. This motion altered the whole proceedings. It may be presumed from this case, that our author was not unacquainted with the civil law, a fruitful source of juridical knowledge, from which the English

⁵ § 116. See the rule D. 16, 3, 1, §§ 36, 37. Where there was a joint bailment, the remedy was by interpleader: *Crawshay v. Thornton*, 2 My. & Cr. 1, at 21; *Hoggart v. Cntta*, Cr. & Ph. 197; *Story*, Eq. Jur. § 800, 824 b (Eng. ed.); *Reeves*, Hist. of the Eng. Law, vol. iii. 453, 454.

are two or more joint depositaries, they are each liable for the restitution of the whole deposit.

When
depository
improperly
refuses to
deliver it.

When the depository improperly refuses to deliver the deposit, the character of his holding becomes altered; and if it is afterwards lost, he is answerable for all defaults and risks;¹ indeed such a refusal amounts to a conversion.²

Articles sent
to an exhibi-
tion.

The case of articles sent for exhibition, for example, to an agricultural society, is not one of gratuitous bailment, for the reason that the exhibition of the article sent constitutes a consideration, since the exhibitor in most cases hopes to derive advantage from the exhibition of his goods, and is induced by that expectation to send them.

Valuable
picture
exhibited.

Even in the case of an exhibition of a rare picture from a private gallery, which the owner has no wish to sell, the greater notoriety it obtains by exhibition, and the prospect of its value being thus enhanced, may be deemed a consideration, of which the Courts will not look to the adequacy.³ In most cases of exhibitions the terms on which articles are lent are specially provided for and must be construed as in the case of any other special contract.⁴

Watch left
with tailor
while trying
on clothes.

A curious American case⁵ may be here noted; where a man

lawyer may derive both instruction and pleasure. Ulpian states the same point in the Digest (D. 16, 3, 14; D. 16, 3, 1, §§ 36, 44; Inst. 3, 15, 2 & 3; Inst. 4, 1, 6; 1 Domat, 141, 142 (ed. 1722) Book 1, tit. 7, §§ 11, 13; Wood, Civil Law (2nd ed.), 209-12; but there is, indeed, a similar determination in Brooke's Abr. (Bailment, pl. 4), probably derived from the same abundant fountain." May v. Harvey, 13 East 197. The law as thus set forth seems to remain the law to-day in the most progressive of modern communities, Gregory v. Stetson, 133 U. S. (26 Davis) 579, as it was amongst the most actively intellectual people of antiquity, Herod. 6, 86. Noy was Attorney-General to Charles I., and is best known for his "invention" of ship money. Hallam, Const. Hist. (8th ed.) vol. ii. ch. viii. 12, has a bombastic and somewhat ridiculous sentence about him, "Shaking off the dust of ages from parchments in the Tower, this man of *venal diligence* and *prostituted learning*, discovered," &c. The above-cited life probably errs as far on the other side of the truth: especially one passage immediately following that extracted. See a curious but not wholly authentic story of Noy in the *Tatler*, No. 9, April 30, 1709; British Essayists, vol. i. 78, which has, notwithstanding, got into the dictionaries; Rose, Biog. Dict. *sub nom.*; Chalmers, Biog. Dict. *sub nom.*

¹ Story, Bailm. § 122. In Y. B. 39 Edw. III. 17, a sealed bag of deeds was bailed to J to hand over. J died and his wife held the bag as executrix. B was held entitled to maintain detinue though he had never been in possession. So an heir has been held similarly entitled for an heirloom, Y. B. 39 Edw. III. 6. Where the article bailed has been lost, to prove this is no answer in detinue: Reeve v. Palmer, 5 C. B. N. S. 84. In Wilkinson v. Verity, L. R. 6 C. P. 206, a service of communion plate was sold by the defendant, to whom it had been bailed for safe custody; more than six years after the sale it was demanded by the plaintiff, who was ignorant of the sale. The Statute of Limitations, 21 Jac. I. c. 16, was held to run from the date of the demand and refusal, and not from the date of the sale. Wilkinson v. Verity is considered in Miller v. Dell (1891), 1 Q. B. 468. Cp. Barton v. North Staffordshire Railway Company, 38 Ch. D. 458; *In re* Tidd, Tidd v. Overell (1893), 3 Ch. 154. As to a depository on express trust, Fells v. Read, 3 Ves. 70, 3 n.

² Marner v. Bankes, 16 W. R. 62.

³ Vigo Agricultural Society v. Brunnsfel, 52 Am. R. 657.

⁴ As to a bailment of a corpse, see Renihan v. Wright, 21 Am. St. R. 249, where are some very uncompromising expressions about the inequity of English ecclesiastical law, *post*, 978.

⁵ Woodruff v. Painter, 30 Am. St. R. 786.

going to a store to be fitted with a suit of clothes, preparatory to trying them on, deposited his watch in a drawer which the storekeeper's salesman pointed out as the fit receptacle. When the customer desired to resume possession the watch was gone, and no explanation of its disappearance was forthcoming. The Court held that the storekeeper became chargeable as a bailee; assuming that a jury would have found that a watch is such personal property as men of the class frequenting the store usually carry with them, and that in the selection of a suit of clothes it is necessary or usual to remove it from the person and lay it aside. The bailment being for the reciprocal benefit of the parties, ordinary care was necessary. If the watch were stolen, such an explanation would be a discharge; nevertheless it was incumbent on the storekeeper to give such explanation of the disappearance of the watch as would enable the bailor to test his good faith.

II. MANDATE.

"A mandate," says Chancellor Kent¹—and his definition meets Definition. with the strong approval of Story²—"is when one undertakes,

¹ 2 Comm. 568.

² Bailm. § 137. A writer in *American Jurist*, vol. xvi. 255, devotes a dozen pages to shew that the definition of Story is incorrect, and that mandate is not a contract, because there is no consideration, and it is therefore *nudum pactum*. In *Cogge v. Bernard*, Holt, C.J., touches upon this point: "But, secondly, it is objected that there is no consideration to ground this promise upon, and therefore the undertaking is but *nudum pactum*. But to this I answer, that the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management," that is as distinguished from a consideration sufficient to oblige him to carry them, which the expressions used seem to discriminate. Cp. *Wheatley v. Low*, 1 Cro. (Jac.) 668, *Hart v. Milles*, 4 C. B. N. S. 371; *Pillans v. Van Mierop*, 3 Bur. 1663. In *Symons v. Darknoll*, Palmer (K. B.) 523, Hyde, C.J., says "delivery makes the contract." In *Fisher v. Liverpool Marine Insurance Company*, L. R. 8 Q. B. 469, at 476, Blackburn, J., speaking of an undertaking to use due skill and diligence, says, "for this undertaking, the mere fact that they were trusted with that duty would be a sufficient consideration." The writer in the *American Jurist* (at 274) decides that this is "a position which even the great name of Lord Holt cannot sustain for a moment." The consideration is sufficient to oblige to care, though possibly not to convey; but if they are conveyed, then the obligation to take care is not lessened thereby. See *Lane v. Cotton*, 1 Ld. Raym. 646, at 655; also *Law Quarterly Review* (1886), vol. ii. 33, "A Difficulty in the Doctrine of Consideration"; and per Grier, J., *Philadelphia and Reading Railroad v. Derby*, 14 How. (U. S.) 468, at 483. The difficulty may be explained by considering the difference between the Roman conception of a contract and that of the common law. In the civil law a gratuitous promise to act for another or to carry his goods was regarded as a consensual contract; by our system it is not obligatory, and if recovery is to be had under it, it must be on the ground of misfeasance. If it is executed it can be sued on in English law, which regards it then as a contract, not perhaps expressly constituted, but raised by law; and treats it as a contract rather than as a breach of duty, in deference to the example of the Roman law, in which system such relations were always looked on as contracts rather than mere duties: see Hare, *Contracts*, 150; Pollock, *Contracts* (6th ed.), 170; and plaintiff's argument in *Steinson v. Heath*, 3 Lev. 400, citing *inter alia*, Y. B. 22 H. VI. 46, 47, "against a chaplain for not reading prayers" (cp. *Williams's Case*, 5 Co. Rep. 72 b); Y. B. 1 E. III. 4, "against a champion *qui se retraxit*." The reporter adds: "But note all those cases are for a tortious nonfeasance, but this here is *quasi* a debt, for which there lies rather debt or assumptionit." The reference to Y. B. 1 E. III. 4, is, however, not correct. Reeves, *Hist. of the Eng. Law* (2nd

without recompense, to do some act for another in respect of the thing bailed."

Dr. Wharton¹ contests the gratuitous character of mandate. As a proposition of Civil Law his contention is opposed to Gaius,² the Institutes,³ and the Digest.⁴

ed.), vol. iii. 89, says that the first instance of an action on the case is in the twenty-second year of the king. Mr. Finlason, however, disputes this in his edition of Reeves, vol. ii. 394, and says there are instances of the "action sur le case" in the reign of Edward I. This, I think, must be a misprint for Edward II. The earliest reference to an "action sur le case" that I can find is in Maynard's Edward II., Y. B. 7 E. II. 244, which may have been in Mr. Finlason's mind. There is a report of an action "sur le case" in Y. B. 7 E. III. 17, pl. 19. In Bro. Abr. Accion Sur le case, pl. 14-26, are a series of cases between the 41st and 48th of E. III. In Shep. Abr. Actions of the Case, 51, is a reference to a case in the 5 E. III. and in Fitzh. De Natura Brev. 92, one to Y. B. 7 E. II. 2. In Wardell v. Mourillyan, 2 Esp. (N. P.) 693, a custom was found by the jury for hoymen known to ply to some particular wharf to discharge their duty, merely by delivering goods sent by their hoys to the wharf. On this, Erskine, who was for the plaintiff, said that if his client could not recover against the hoyman he was suing, he would be without remedy, as he could not maintain an action against the wharfinger because there was no privity of contract between them. To this Kenyon, C.J., answered: "The delivery of the goods at the wharf by the hoyman, raised an implied contract on the part of the wharfinger to take care of them, or to deliver them according to the direction, for the breach of which an action would lie." In Langdell's Summary of the Law of Contracts, § 46, a consideration that gives rise to a debt and one that would only sustain an action in assumpsit are distinguished. To constitute a debt the thing given or done in exchange for the promise (1) must be done to or for the obligor directly; (2) must be in legal contemplation the sole motive for assuming the obligation; and (3) must be executed, not promised merely. To raise an assumpsit none of the foregoing elements are necessary; it is enough if anything be given or done in exchange for the promise. See also the note to Edwards v. Davis, 16 Johns. (Sup. Ct. N. Y.) 281, at 284, and the learned note to 2 Parsons, Contracts (6th ed.) 100. *Ante*, 889, and *post*, 927.

¹ Negligence (2nd ed.), §§ 482, 491. Dr. Moyle, Just. Inst. 3, 26, 13, note, says: "The true test is whether the parties intended the remuneration to be recoverable by action; if not, it will be *mandatum: si remunerandi gratia honor intervenit, erat mandati (not locati or conducti) actio*, D. 17, 1, 6, pr." See Walker, Selected Titles to the Digest, Introduction to Part I. ² 3, 26, §§ 1, 13.

³ D. 17, 1, 1, § 4: *Mandatum, nisi gratuitum nullum est; nam originem ex officio, atque amicitia trahit; contrarium ergo est officio merces, interveniente enim pecunia, res ad locationem et conductionem potius respicit*. The only notice Wharton takes of this authority is, Negligence (2nd ed.), § 486, summarizing the opinion of a German author, Dr. J. Baron, "The opinion once was that the two [hiring and mandate] were distinguished by the fact that in the first case the labour was for reward, in the other case without reward. No doubt some passages in the Digest suggest such a distinction." Then in a footnote is a reference to the passage just set out, together with that cited, *supra*, from the Institutes, and also to D. 19, 5, 22. There is a limitation to be imposed on the statement as to the purely gratuitous character of *mandatum*. Severus and Antoninus provided that a promised honorarium might be exacted by appealing to the *extraordinaria cognitio* of the magistrate, *de salario quod promisit a præsede provincie cognitio præbabitur*: Cod. 4, 35, 1. In connection with this must be considered the fact that the professors of a liberal art—that is advocates, physicians, oculists, aurists, dentists, librarii, notarii, accountants, schoolmasters, nurses, rhetoricians, grammarians, geometers, land surveyors, D. 50, 13—could recover a remuneration under the name of *salarium* or honorarium from the prætor. "*Adversus eum cujus negotia gesta sunt, de pecunia quam, de propriis opibus, vel ab aliis mutuo acceptam erogasti, mandati actione pro sorte et usuris potes experiri. De salario autem quod promisit, apud præsidem provincie cognitio præbabitur*: Cod. 4, 25, 1. See Pothier, Traité du Contrat de Mandat, ch. i. sec. 2, art. iii., De la Gratuité du Mandat; Pothier, Pand. 17, 1, 1, art. 2, *Quo sensu ad substantiam mandati requiratur ut sit gratuitum?* Sohm, Inst. of Roman Law (Eng. Trans.), 314; 1 Bell, Comm. (7th ed.), 506; Hare, Contracts, 93. When, however, a mandate had been entered upon it had to be performed: *Voluntatis est suscipere mandatum necessitatis consummare*: D. 13, 6, 17, § 3. But it might be abandoned (1) if the mandator were not prejudiced thereby, D. 17, 1, 22, § 11; and (2) *ob subitam valetudinem, ob necessariam peregrinationem, ob inimicitiam et inanes rei actiones integra adhuc causa mandati*: Paul. Sent. Rect. 2, 15, 1.

As a proposition of English law Dr. Wharton is concluded by the expression of Holt, C.J., in *Coggs v. Bernard*:¹ "The sixth sort [i.e., of bailment] is when there is a delivery of goods or chattels to somebody who is to carry them, or to do something about them, *gratis*, without any reward for such his work or carriage."²

Meaning in English law.

Between deposit and mandate, says Sir William Jones,³ the distinction is that the former lies in custody and the latter in feasance. It has been pointed out by Story⁴ that in cases of deposit there is always something to be done, while in mandate there is commonly something to be guarded; so that in each contract there is custody and labour and service to be performed. He therefore amends the suggested distinction, and says: "The true distinction between them [i.e., deposit and mandate] is, that in the case of a deposit the principal object of the parties is the custody of the thing, and the service and labour are merely accessorial; in the case of a mandate the labour and services are the principal objects of the parties, and the thing is merely accessorial."

Distinction between deposit and mandate.

When the person to whom goods are entrusted—the mandatary—delivers them to another person, and they receive an injury for which the mandatary would be liable over to the owner, there does not seem to be any objection in principle to his right to recover for his own indemnity though he, no more than a depositary, has any property in the goods. The general principle of the common law is that possession with an assertion of right, and in many cases possession alone, is a sufficient title to enable the possessor to maintain a suit against a mere wrongdoer for any injury or wrong done to the thing injured.⁵

Delivery by the mandatary.

Story enumerates the requisites of a contract of mandate:⁶

Requisites of a contract of mandate.

1. It must respect an act to be done *in futuro*, and not one already completed.⁷

2. It must be gratuitous.⁸

3. There must be a voluntary intention on the part of both parties to enter into the contract.⁹

¹ 2 Ld. Raym. 909, 1 Sm. L. C. (9th ed.), 201.

² Jones, Bailm. 52, 117; Pothier, *Traité du Contrat de Mandat*, art. prélim., n. 1.

³ Bailm. 53.

⁴ Bailm. § 140.

⁵ Story, Bailm. § 152, and *ante*.

⁶ Bailm. §§ 145, 160.

⁷ *Ut sit gerendum, non jam gestum*: Pothier, Pand. 17, 1, 1, art. 1.

⁸ Bailm. § 153. Pothier, Pand. 17, 1, 1, *Mandatum est contractus quo quis negotium gerendum committit alicui gratis illud suscipienti, animo invicem contrahendæ obligationis*. Maynz (2nd ed.), vol. ii. 211, says: *Mandare signifie donner pouvoir, manum dare. Dans le sens spécial qui nous occupe ici, on entend par mandat, le contrat par lequel une personne s'oblige envers une autre à faire gratuitement une chose dont cette dernière la charge*. Maynz specifies three conditions as necessary to constitute this relation—(1) A person who commits something to another to do; (2) An acceptance of the charge by that person; (3) A gratuitous engagement.

⁹ Bailm. § 155. Pothier, Pand. 17, 1, 1, § 1, *Ut animo contrahendæ invicem obligationis*

4. The act to be done should be lawful and not against sound morals.¹

5. It may be in any form.²

Obligations of
the mandatary.

Pothier³ states the obligations of the mandatary as three-fold :

1. To do the act which is the object of the mandate, and with which he is charged.

2. To bring to it all the diligence it requires.

3. To give an account of his dealings with it.

1. To do the
act which is
the object of
the mandate.
Nonfeasance.

1. Sir William Jones⁴ seeks to assimilate the doctrines of the civil and the common law, and contends that an action will lie for damage occasioned by the non-performance of a promise to become a mandatary, if special damage is shewn. The doctrine of the Roman law is stated in the Institutes,⁵ but the law of England is clearly established in an opposite sense. A mandatary, or one who undertakes to do an act for another without reward, is not answerable for omitting to do the act, and is only responsible when he attempts to do it and does it amiss.⁶

Only liable for
misfeasance.

In other words, he is responsible for a misfeasance though not for a nonfeasance, even if special damage be averred. The difficulty of the early cases was to explain how an action of trespass on the case could be brought for a nonfeasance; this was also the original difficulty in the way of the action of assumpsit as a branch of the action on the case.⁷

2. To bring
to bear the
requisite
amount of
diligence.

2. To bring to it all the diligence it requires.

Ulpian's famous rule states : *Dolum et culpam mandatum*.⁸ Sir William Jones,⁹ however, makes a great point of the want of agreement of the civilians on the subject of the degree of diligence requisite. By the common law, as the contract is wholly gratuitous and for the benefit of the owner, the mandatary is only liable for gross negligence.¹⁰ Sir William Jones¹¹ takes a distinc-

Sir William
Jones's view.

committatur et suscipiatur. In Gothofred's edition of the Digest there is a note to D. 17, 1, 1, § 2 : *Mandatum uno rogante, altero recipiente perficitur. Hæc duo verba Rogo et Recipio citra stipulationem perficiunt mandatum*.

¹ Bailm. § 158. *Rei turpis nullum mandatum est* : D. 17, 1, 6, § 3; Pothier, *Traité du Contrat de Mandat*, n. 11.

² Dig. 17, 1, 1 : *Obligatio mandati, consensu contrahentium consistit*.

³ *Traité du Contrat de Mandat*, n. 37. Cp. Code Civil, arts. 1991-1993.

⁴ Bailm, 54. 56.

⁵ Inst. 3, 26, 11. The Digest is to the same effect, D. 17, 1, 5, § 1.

⁶ *Elsee v. Gatward*, 5 T. R. 143; *Balfé v. West*, 13 C. B. 466; *Thorne v. Deas*, 4 Johns. (Sup. Ct. N. Y.) 84; 2 Kent Comm. 569-573, on the distinction between a total omission to act and negligence in acting; *Wilkinson v. Coverdale*, 1 Esp. (N. P.) 75, is a case where positive injury resulted from the neglect to act—the plaintiff was misled. See also the judgment of Porter, J., *Percy v. Millaudon*, 8 Mart. N. S. (La.), 68, at 75, 89; *Hare, Contracts*, 162; 2 *Parsons, Contracts* (6th ed.) 102.

⁷ Remarks upon the Law of Bailment, 16 Am. Jur. 253; *Holmes, The Common Law*, 275.

⁸ D. 50, 17, 23.

⁹ Bailm. 14, 15, 16.

¹⁰ *Doorman v. Jenkins*, 2 A. & E. 256.

¹¹ Bailm. 62. See 2 *Parsons, Contracts* (6th ed.) 104 n.

tion between "a bailment without reward to carry from place to place" and "a mandate to perform a work." With reference to the former, he cannot "conceive that the bailee is responsible for less than gross neglect." With reference to the latter, "he is bound to use a degree of diligence adequate to the performance of it."¹ Story² does not accept this distinction, which he says is supported by reasoning "exclusively derived" from the civil law, which applies the rule "to all cases of mandates whatsoever, and by no means limits it to cases where work is to be performed." "To carry jewels safely may be a far more valuable service, and require far more vigilance, than to clean the gold which enchases them." "Where the act to be done requires skill, and the party who undertakes it either has the skill, or professes to have it, there he may be well made responsible for the want of due skill or for the neglect to exercise it." Of course if a man undertakes to perform a work in such circumstances that a representation of capacity is involved, he must act up to his representation or pay for the damage he causes. If the circumstances do not affect him with a special responsibility the law does not.

Dissented from
by Story in
his treatise
on Bailments.

Shiells v. Blackburne³ is in point here. A merchant having undertaken voluntarily and without reward to enter a parcel of goods belonging to the plaintiff at the custom-house for exportation, made an entry under a wrong denomination, whereby plaintiff's parcel, together with a similar one of his own, were seized and lost. The plaintiff having brought his action, it was held that, failing gross negligence, the defendant was not liable. "I agree with Sir William Jones," said Lord Loughborough, C.J.,⁴ "that where a bailee undertakes to perform a gratuitous act, from which the bailor is alone to receive benefit, there the bailee is only liable for gross negligence; but if a man gratuitously undertakes to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence. If in this case a ship-broker, or a clerk in the custom-house, had undertaken to enter the goods, a wrong entry would in them be gross negligence, because their situation and employment necessarily imply a competent

Shiells v.
Blackburne.

Judgment of
Lord Lough-
borough.

¹ Bailm. 53; see also 22, 61, 98, 120.

² Bailm. § 177.

³ 1 H. Bl. 158. In Moore v. Mourgne, 2 Cowp. 479, an agent, having written orders to do so, procured a policy of insurance to be made. In the policy as executed, there was an exception of a risk, common in the policies of other offices, although not in those used by the office where the insurance was made. The loss arose from such risk. The Court held that the agent was not liable, as he had acted *bond fide* and without gross negligence. The probability is that this was a gratuitous undertaking, yet that it was so in fact is nowhere stated in the report.

⁴ 1 H. Bl. at 163.

degree of knowledge in making such entries; but when an application, under the circumstances of this case, is made to a general merchant to make an entry at the custom-house, such a mistake as this is not to be imputed to him as gross negligence."¹

Dartnall v.
Howard.

In *Dartnall v. Howard*² the element of a "situation or profession," from which special skill could be inferred, appears to have been absent; and the decision there consequently marks the other aspect of the principle we are now considering. The declaration alleged that in consideration that plaintiff should retain defendants to lay out a sum of money, they undertook to do their duty in the premises. On motion in arrest of judgment, the count was held bad, as it did not state that any reward was to be paid to the defendants, or that they were employed in any particular character so as to be responsible for taking a bad security without negligence or fraud. Abbott, C.J., in delivering the judgment of the Court, said:³ "I am of opinion that the count is bad. The only duty that is imposed under such a retainer and employment as is here mentioned is a duty to act faithfully and honestly, and not to be guilty of any gross or corrupt neglect in the discharge of that which he undertakes to do. But a man may, when acting most faithfully and most honestly, happen to take an insufficient security;⁴ without gross or culpable negligence on his part, he may have been misled, he may have been deceived, he may have taken such care as an ordinary man would take with regard to the subject-matter entrusted to him, and yet, doing all that, his endeavours may have failed, and it may so happen the security may without his knowledge and against his will have turned out to be insufficient. For these reasons it appears to the Court that this count is not sustainable." *Coggs v. Bernard*⁵ is an authority in the same direction, the undertaking to carry "safely" being regarded as a holding out by the defendant that he was skilled in the particular business.

Judgment of
Abbott, C.J.

Thorne v.
Deas.

In the well-known case of *Thorne v. Deas*,⁶ Kent, C.J., also disapproved Sir William Jones's view that a mandatary commissioned to perform work is bound "to use a degree of diligence to the performance of it." He said: "I have carefully

¹ Cp. *Bourne v. Diggle*, 2 Chitty (K. B.), 311; *O'Hanlon v. Murray*, 12 Ir. C. L. R. 161; and *Fish v. Kelly*, 17 C. B. N. S. 194; which are solicitors' cases, where *Shiella v. Blackburne* is cited and followed. See *Chapman v. Morley*, 7 Times L. R. 257.

² 4 B. & C. 345.

³ L. c. at 350.

⁴ I have ventured to alter the punctuation of this passage.

⁵ 2 Ld. Raym. 909, 1 Sm. L. C. (9th ed.), 201.

⁶ 4 Johns. (Sup. Ct. N. Y.) 84, at 96. At 90 there is a translation of the case in *Y B. 3 H. VI. 36*, pl. 33, on which Sir Wm. Jones comments, and which comments are discussed in the argument.

examined all the authorities to which he refers.¹ He has not produced a single adjudged case, but only some dicta (and those equivocal) from the Year Books, in support of his opinion; and was it not for the weight which the authority of so respectable a name imposes, I should have supposed the question too well settled to admit of an argument." The learned Chief Justice expresses an opinion far from favourable to the portion of Sir William Jones's essay dealing with mandates, and, while recognising the correctness of its presentation of the civil law, altogether discredits its conclusions on the common law.²

3. To give an account of his dealings with it.

Duty to
account.

The mandatary, says Story,³ is bound to render to the mandator, upon request, a full account of his proceedings; to shew that the trust has been duly performed; or if it has been ill performed, to offer a justification or legal excuse for such ill-performance. The form and mode in which the remedies of the bailor are to be enforced, in case of any fault committed by the mandatary, for which he is responsible, will depend upon the municipal law of the particular country. In the Roman law and the foreign law derived from it, the remedy would ordinarily be the *actio mandati directa*; in the common law it would be either an action founded on the contract, as *assumpsit*, or an action founded on the tort, as an action on the case for misfeasance or negligence or conversion.

Story,⁴ with whom the English authorities are in accord, sums up the rule of the common law as to the obligations attaching to a mandatary as follows: "A mandatary, who acts gratuitously in a case, where his situation or employment does not naturally or necessarily imply any particular knowledge or professional skill, is responsible only for bad faith or gross negligence. If he has the qualifications necessary for the discharge of the ordinary duties of the trust which he undertakes and he fairly exercises them, he will not be responsible for any error of conduct or action into which a man of ordinary prudence might have fallen. If his situation or employment does imply ordinary skill, or knowledge adequate to the undertaking, he will

Rule of the
common law
as summed up
by Story.

¹ These are set out and considered in the judgment as reported.

² The distinction between cases like *Smith v. Lascelles*, 2 T. R. 187, and *Webster v. De Tastet*, 7 T. R. 157, is also pointed out in the judgment. *Cohen v. Kittell*, 22 Q. B. D. 680, was an attempt to recover against defendant for "having failed to make certain bets pursuant to the plaintiff's instructions." The development of the action of trespass on the case through *assumpsit* into a declaration for mere breach of agreement is well treated, *l. Holmes, The Common Law*, 275. *Ante*, 889, 922.

³ *Bailm.* § 191.

⁴ *Ibid.* § 182 a.

be responsible for any losses or injuries resulting from the want of the exercise of such skill or knowledge. If he is known to possess no particular skill or knowledge, and yet undertakes to do the best which he can under the circumstances, all that is required of him is the fair exercise of his knowledge and judgment and capacity. This general responsibility may be varied by a special contract of the parties either enlarging or qualifying or narrowing it, and in such cases the particular contract will furnish the rule for the case."¹

With this may be conjoined Dr. Hare's statement of the civil

Mandatory's
duty by the
civil law.

¹ Jenkins v. Betham, 15 C. B. 168. See 2 Kent, Comm. 571-574; Shiells v. Blackburne, 1 H. Bl. 158; Rooth v. Wilson, 1 B. & Ald. 59. Wharton cites this last case Negligence (2nd ed.) § 508, as an authority for the proposition that the defendant was bound to "apply the care of a good hostler." Neither the judgment nor the argument as reported, goes nearly this length. The utmost the case decides is that the defendant "owes it to the owner of the horse not to put it in a dangerous pasture," which seems scarcely correlative with a duty to "apply the care of a good hostler." Wilson v. Brett, 11 M. & W. 113.

Negotiorum
gestor.

The quasi-contract of a *negotiorum gestor* in the civil law must not pass without notice. A *negotiorum gestor* was a person who, of his own accord, and without the knowledge of the owner, intermeddled with property. As the intermeddling was without any mandate, a higher degree of skill was required from the *negotiorum gestor* than in other cases. *Si negotia absentis et ignorantis geras et culpam et dolum præstare debes.* D. 3, 5, 11. *Is qui utiliter gesserit negotia habet obligatum dominum negotiorum, et ita et contra iste quoque tenetur, ut administrationis rationem reddat. Quo casu ad exactissimam quisque diligentiam compellitur reddere rationem: nec sufficit talem diligentiam adhibere, qualem suis rebus adhibere solet, si modo alius diligentior eo commodius administraturus esset negotia:* Inst. 3, 28, § 1. However, to this there was an exception: where the business undertaken was that of a friend in a case of apparent necessity, the liability attaching was only for bad faith and fraud: Pothier, Pand. 3, 5, 52. Pothier gives the reason: *Parcequ'il vaut mieux pour l'absent que ses biens soient administrés par un homme négligent, que s'ils étaient vendus.* Story considers (Bailm. § 190) the case of Nelson v. Macintosh, 1 Stark. (N.P.) 237, already set out in the text (*ante*, 914), to approach very near to that of a *negotiorum gestor*. Drake v. Shorter, 4 Esp. (N.P.) 165, seems undistinguishable. Defendant, who was employed in an invention for making a vessel sail against wind and tide, employed the plaintiff to work on her. While working, the vessel took fire, and the defendant used a boat belonging to the plaintiff to endeavour to extinguish the fire, with the result of sinking and losing it. The defence was, that the interference was to prevent the fire spreading. Lord Ellenborough, C.J., held that this amounted to a good defence. "What," he said, "might be a tort under one circumstance, might, if done under others, assume a different appearance. As, for example: if the thing for which the action was brought, and which had been lost, was taken to do a work of charity, or to do a kindness to the person who owned it, and without any intention of injury to it, or of converting it to his own use; if, under any of these circumstances, any misfortune happened to the thing, it could not be termed an illegal conversion; but as it would be a justification in an action of trespass, it would be a good answer to an action of trover." Espinasse is not reckoned an accurate reporter, and it is difficult to accept fully the wording of this principle. Something more would be required than the taking "to do a work of charity, or to do a kindness to the party who owned it, and without any intention of injury to it, or of converting it to his own use." Probably Lord Ellenborough, C.J., laid down the law in accordance with Laboulaye: *Interdum in negotiorum gestorum actione dolum solummodo versari. Nam si affectione coactus, ne bona mea distraherentur, negotiis te meis obtuleris acquissimum esse dolum duntaxat te præstare:* Pothier, Pand. 3, 5, 52. A less necessity than this would not seem properly to excuse. The subject of *negotiorum gestio* is very fully treated in Maynz, *Éléments de Droit Romain* (2nd ed.), vol. ii. 410. De la gestion d'affaires; Sohm, *Inst. of Roman Law* (Eng. ed.) 318; Pothier: *Du quasi contrat negotiorum gestorum*, App. to *Traité du Contrat de Mandat*. See note Moyle, *Just. Inst.* 3, 27, 1, and note (c) 2 Kent Comm. 616; also *Livermore Agency*, vol. i. 8, 12, 50-52. See, too, *Dunbar v. Wilson and Dunlop's Trustees*, 15 Rettie, 210, and for the case of the claim for salvage of one saving a ship believing it to be his own which turned out to be another's property: *The Liffey*, 58 L. T. 351.

Nelson v.
Macintosh.
Drake v.
Shorter.

law. In mandate, says he,¹ after pointing out that the usual test of the degree of care requisite in the case of bailments is whether the bailment was made in the interest of the bailor or bailee, or for an end beneficial to both, and after enunciating the rules applicable in the respective cases, "the obligation was not deduced from the law, but arose from the express or implied undertaking of the mandatary to do all that was requisite and practicable for the fulfilment of the trust; and he was consequently answerable for any loss or failure that might have been averted by due care, or such skill as might reasonably be expected from a man of his training or profession. One who engaged to carry the goods of another to a given point, or to expend labour or skill upon them for the benefit of the owner, was therefore answerable for exact diligence, and could not rely on the gratuitous nature of the undertaking as an excuse for a loss that might have been foreseen and avoided."²

When property is remitted voluntarily by the owner to another, with a direction to apply it for the benefit of a third person, or when the owner gives such a direction about property already in the possession of the person he addresses, he whose benefit is intended cannot enforce his claim by legal proceedings; and the mandate is revocable by the owner at any time before it is executed, or at least before any engagement is entered into with the third person to execute it for his benefit.³

Third person
for whose
benefit a
mandate is
given has no
direct remedy
against the
mandatary.

III. GRATUITOUS LOAN.

The Roman jurists divided contracts *re*—that is, where one received property from another in circumstances which rendered it his duty to return it or a thing of a like kind—into *mutuum*, *commodatum*, *pignus*, and *depositum*.⁴ We have already consi-

Roman con-
tracts *re*.

¹ Contracts, 77. Dr. Hare refers to two cases: (1) *Tompkins v. Saltmarsh*, 14 Ser. & R. (Pa) 275, where it is held that where one has undertaken to perform a gratuitous act, from which he was to receive no benefit (in the case in question, to deliver a letter containing money) "the bailee is only liable for gross negligence, *dolo proximus*, a practice equal to a fraud;" (2) *Beardalee v. Richardson*, 11 Wend. (N. Y.) 25, where a person received a sealed letter, which he engaged to deliver, and where the rule of diligence was laid down in the same way as in the earlier case.

² The Roman rule is eloquently stated by Cicero, pro Roscio Amerino, c. 38: *In privatis rebus si qui rem mandatam non modo malitiosius gessisset, sui quæstus aut commodi causâ, verum etiam negligentius: eum majores summum admisisse dedecus existimabant. Itaque mandati constitutum est judicium, non minus turpe, quam furti. Ergo idcirco turpis hæc culpa est, quod duas res sanctissimas violat, amicitiam et fidem. Nam neque mandat quisquam fere, nisi amico; neque credit, nisi ei quem fidelem putat. Perditissimi est igitur hominis, simul et amicitiam dissolvere, et fallere eum, qui laus non esset, nisi credidisset.*

³ *Scott v. Porcher*, 3 Meriv. 652; *Williams v. Everett*, 14 East, 582. See *Malcolm v. Scott*, 3 Hare, 39, at 51, affd. 14 L. J. Ch. 57. Cp. *Fleet v. Perrins*, L. R. 4 Q. B. 500, 512. *Ante*, 349 n.⁴

⁴ *Sanders, Justinian* (8th ed.) 327. As to *commodatum*, see D. 13, 6. *Duncan v. Town of Arbroath*, *Morison Dict.* of Dec. 10075, is a curious case on *commodatum*. A man lent three cannon to the town of Arbroath, which gave a bond to restore them.

Distinction
between
commodatum
and *mutuum*.

dered the case of *depositum*. We are now come to *commodatum*, which Sir William Jones, translating Pothier's *Prêt à Usage*,¹ has called loan for use. This distinguishes it from *mutuum*, which is a loan for consumption. *Commodatum* differs from *mutuum* in two principal particulars—

First, it is necessarily gratuitous; for, if the lender receives compensation, the agreement becomes one of *locatio conductio*.

Secondly, the goods remain the property of the lender.²

If, then, they are destroyed or perish through causes outside any failure to exercise the due care and diligence required of the *commodatarius*, all liability on his part ceases, and the *commodans* is not entitled to damages.³ The destruction of a *mutuum*, on the other hand, does not discharge the borrower, though not due to his fault. This is an effect of the principle expressed in the maxim, *Res perit domino*.⁴

Definition of
gratuitous
loan.

"Lending for use," says Sir William Jones,⁵ "is a bailment of a thing for a certain time to be used by the borrower without paying for it." Pothier's definition is: *Le prêt à usage est un contrat par lequel un des contractants donne gratuitement à l'autre une chose, pour s'en servir à un certain usage; et celui qui la reçoit, s'oblige de la lui rendre après qu'il s'en sera servi*.⁶ To constitute this contract there are required—

Constituents:

(1) A thing
lent.

(1) A thing which is lent, and which must be personal property, since, according to the definition of Holt, C.J.,⁷ "the borrower is bound to the strictest care and diligence to keep the goods, so as to restore them back again to the lender."

within twenty-four hours after they were required, "without hurt, skaith, or damage," in case of which the town obliged itself to make payment of £500. The cannon were captured by Cromwell at the battle of Dunbar. In 1668, the owner sued for their return or the £500. The town pleaded loss "*casu fortuito et vi majori*." The pursuer admitted that "in *commodatum* the borrower hath not the peril, yet there is an exception—*si commodatum sit estimatum*—when the peril is the borrower's and it is no proper loan but rather sale"; for this he quoted D. 13, 6, 5, § 1. He also urged that by the bond the peril was undertaken: "likewise they" (the town) "were negligent, that they buried the cannon to the knowledge of their whole town; whereas they should have entrusted some few to have done it in the night." The decision was that the town was not liable. This decision, however, appears to be wrong, as by their bond the town was bound to return the cannon or to pay £500 if unable to do so through "hurt, skaith, or damage."

¹ Bailm. 64. See Maynz, *Éléments de Droit Romain* (2nd ed.), vol. ii. 264.

² *Rei commodata et possessionem et proprietatem retinemus*: D. 13, 6, 8. *Nemo enim commodando rem facit ejus cui commodat*: D. 13, 6, 9.

³ *Eum, qui rem commodatam accepit, si in eam rem usus est, in quam accepit, nihil prestare, si eam in nulla parte culpa sua deteriore fecit, verum est; nam si culpa ejus fecit deteriore tenebitur*: D. 13, 6, 10.

⁴ Poste, *Gaius* (3rd ed.), 349; *Inst.* 3, 14, 2; *Hare, Contracts*, 74. As to what is sufficient to fix a vendor with the risk of the destruction or injury of the thing sold, see note to *Bailey v. Culverwell*, 2 *Man. & R.* 564, at 564. *Post*, 960 et seqq.

⁵ *Bailm.* 118.

⁶ *Cp. Code Civil*, art. 1875.

⁷ 2 *Ld. Raym.* 909, at 915; 1 *Sm. L. C.* (9th ed.), 201. By all consents, it is said in *Duncan v. Town of Arbroath*, *Morison, Dict. of Dec.* 10075, *commodatarius tenetur pro levissima culpa et summa diligentia*.

(2) A *gratuitous* lending ; otherwise, as Pothier¹ points out, it becomes a letting, if the consideration is money, or an innominate contract, when it is anything else given or work done. (2) Gratuitously.

(3) A lending for the use of the borrower.²

(3) For the use of the borrower.

(4) A lending where the thing lent must be itself returned at the determination of the bailment.³

(4) But to be returned. Obligations of the borrower.

The obligations of the borrower are—(1) To take proper care of the thing borrowed ; (2) To use it according to the expressed or known intention of the lender ; (3) To restore it in a proper condition. Of these in their order.

First, as to the proper care of the thing borrowed. In *Vaughan v. Menlove*,⁴ Tindal, C.J., quoting and adopting Holt, C.J., in *Coggs v. Bernard*, lays down the rule as follows : “ It has been urged that the care which a prudent man would take, is not an intelligible proposition as a rule of law, yet such has always been the rule adopted in cases of bailment, as laid down in *Coggs v. Bernard*.⁵ Though in some cases a greater degree of care is exacted than in others, yet in ‘ the second sort of bailment, viz., *commodatum*, or lending gratis, the borrower is bound to the strictest care and diligence to keep the goods so as to restore them back again to the lender ; because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect he will be answerable ; as, if a man should lend another a horse to go westward, or for a month, if the bailee put his horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him ; but if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that, and steal the horse, he will be chargeable, because the neglect gave the thieves the occasion to steal the horse.’ The care taken by a prudent man has always been the rule laid down ; and as to the supposed difficulty of applying it, a jury has always been able to say whether, taking that rule as their guide, there has been negligence on the occasion in question.”⁶ I. To use proper care.

This has been so to the extent of holding the loan to be strictly

¹ *Prêt à Usage*, n. 3.

² Story, *Bailm.* §§ 225, 227.

³ *Non potest commodari id, quod usu consumitur ; nisi forte ad pompam vel ostentationem quis accipiat* : D. 13, 6, 3, § 6.

⁴ 3 Bing. N. C. 468, at 475.

⁵ 2 Ld. Raym. 909. Compare the rule of the civil law in the case—*In rebus commodatis talis diligentia præstanda est, qualem quisque diligentissimus paterfamilias suis rebus adhibet* : D. 13, 6, 18. *Is, qui utendum accepit, sane quidem exactam diligentiam custodiæ rei præstare jubetur nec sufficit ei, tantam diligentiam adhibuisse, quantum suis rebus adhibere solitus est* : Inst. 3, 14, 2, and this because *Commodatum autem plerumque solum utilitatem continet ejus, cui commodatur ; et ideo verior est Quinti Mucii sententia, existimantis, et culpam præstandam et diligentiam* : D. 13, 6, § 2.

⁶ 1 Stair, *Inst.* 1, 11, § 9 ; Ersk. *Inst.* 3, 1, §§ 20, 21.

personal, unless a more extensive use could be implied from the circumstances, as in *Bringloe v. Morrice*,¹ the case of overriding a horse. There, North, C.J., took a distinction between a loan for a stated time and one for an indefinite time. In the former case, the borrower has an interest in the horse, and the borrower's servant may ride it; in the other case, not. A difference was also pointed out between hiring a horse to go to York, and borrowing a horse. In the first place, the servant may ride it to its destination; in the latter case, not. In *Lord Camoys v. Scurr*,² where a mare was for sale, and A asked the agent of the vendor for a trial, Coleridge, J., held that he was entitled to depute the trial to a competent person.

Lord Camoys
v. Scurr.

*Wilson v. Brett*³ was a somewhat similar case. Plaintiff entrusted a horse to ride to the defendant, a competent person; while defendant was riding it, the horse fell down, and was injured. The judge at the trial directed the jury that "the defendant, being shewn to be a person skilled in the management of horses, was bound to take as much care of the horse as if he had borrowed it." Parke, B., thus explains the ruling:⁴ "The whole effect of what was said by the learned Judge as to the distinction between this case and that of a borrower was this; that this particular defendant, being in fact a person of competent skill, was in effect in the same situation as that of a borrower who in point of law represents to the lender that he is a person of competent skill. In the case of a gratuitous bailee, where his profession or situation is such as to imply the possession of competent skill, he is equally liable for the neglect to use it." That is, a gratuitous bailee, with competent skill, is required to use the skill he has; but a borrower is required to have competent skill; for, as Alderson, B., puts it in the same case, "the party bargains for the use of competent skill, which here becomes immaterial, since it appears that the defendant has it."

Onus if loan
not returned.

The *onus* of proof lies on the borrower, if the thing is not returned on a loan to use, for the borrower must account satisfactorily for the loss or pay the value.⁵

Borrower not
an insurer.

Though the diligence required from a borrower is exact, he is not an insurer. The article lent is subject to the kind and mode of use for which it is designed; and the risk of such losses as are fairly incident thereto is with the owner, unless the bailee

¹ 1 Mod. 210, reported also *sub. nom.* *Bringloe v. Morison*, 3 Salk. 271.

² 9 C. & P. 383.

³ 11 M. & W. 113.

⁴ *L. c.* at 115.

⁵ *Bain v. Strang*, 16 Rettie 186; *Pothier, Prêt à Usage*, n. 40 *et seqq.* If the article perish through neglect or imprudent conduct, the borrower must pay the value: *Niblett v. White's heirs*, 7 La. Rep. 253. See *post*, Carriers for Hire.

has failed in any particular of his duty with regard to it. *Beller v. Schultz*¹ illustrates this. The owner of a flag lent it to be hoisted on the bailee's building, and, having assisted to hoist it, left it flying when he went away; the flag was afterwards injured by a hailstorm. The Court held that the owner could not recover for the damage, on the ground that the thing lent was made on purpose to be used as a flag, and the propriety of exposing it in the situation in which it was injured could not be questioned by the plaintiff, as it was in substance his own act, and the bailment was not shewn to have been abused.

Beller v. Schultz.

To the rule of diligence just stated two exceptions may be made: Two exceptions:

(1) Where there is a special contract, expressed or implied; when the terms of the bailment are, of course, determined by the terms prescribed. To this head may be referred a case which *Story*² suggests: "If the lender is aware of the incapacity of the borrower, he has no right to insist upon such rigorous diligence. He has a right to insist on that degree of diligence only which belongs to the age, the character, and the known habits of the borrower." A loan in these circumstances would seem to be in the nature of a contract, made with reference to the peculiarities of age, character, and habit of the borrower. Thus, the loan of a valuable horse to a notoriously reckless rider would be on special terms applicable to such rider. (1) Where there is a special contract.

(2) Where the loan is not for the benefit of the borrower alone; for, if it is for the mutual benefit of the borrower and lender, only ordinary diligence is required.³ (2) Where the loan is for the mutual benefit of borrower and lender.

The borrower is exempted from liability for losses by inevitable accident or the act of God. Still there must be no default on the part of the borrower, otherwise his responsibility remains.⁴ So it does if he is guilty of fraud *vel suppressione veri vel allegatione falsi*.⁵

In the case of a conflict of duty, as where the borrower's goods and the goods borrowed are both jeopardized by fire in circumstances where one set of goods can be saved, though not both, *Story*,⁶ differing from *Pothier*⁷ and *Sir William Jones*,⁸ considers the true test of liability to be, whether there is any negligence in not saving the borrowed goods; and whether there is any superior duty of the borrower to save them and sacrifice his own. By superior duty the learned commentator, of course, means a duty arising out of the facts and circumstances, which would be the Conflict of duty.

¹ 28 Am. R. 280.

² *Bailm.* § 237.

³ *Jones*, *Bailm.* 70.

⁷ *Prêt à Usage* 256. See *ante*, 898.

² *Bailm.* § 237.

⁴ *Jones*, *Bailm.* 67, 68, 69, 104, 105.

⁶ *Story*, *Bailm.* § 249 b.

⁸ *Bailm.* 69.

proper material for the inferences of a jury, and not a duty by law, the existence of authority to support which he denies.

On what principle compensation is fixed in case of loss.

Another controversy under this head of law is whether, in the case of a valued loan, or where the goods are estimated at a certain price, the borrower must be considered as bound in all events to restore either the things lent or the value.¹ Story is of opinion² that at common law the solution turns wholly on the construction of the words of the particular contract. The mere estimation of a price will not settle the point, whether the borrower takes upon himself every peril, or any additional perils beyond those provided for by the common rules of law; for it will be considered as a mere precaution to avoid dispute in case of a loss, unless some circumstances raise a presumption that the parties intend something more.³

II. The borrower to use the loan according to the intention of the lender.

Second: The obligation of the borrower is to use the loan according to the expressed or known intention of the lender.

This use is strictly confined to what is expressed or implied in the particular transaction. The illustration of this given by Sir William Jones⁴ is: "If William, instead of coming to London, for which purpose the horse was lent, go towards Bath, or, having borrowed him for a week, keep him for a month, he becomes responsible for any accident that may befall the horse in his journey to Bath, or after the expiration of the week."⁵

If the borrower is put to any expense in using the thing, he must pay this himself; though any expense incurred upon the thing lent not arising out of his use of it, the borrower is entitled to be recouped by the lender.⁶

III. The borrower must restore the thing lent in a proper condition.

Third: The obligation of the borrower is to restore the thing lent in a proper condition.⁷

¹ The controversy has grown from two texts of the Roman law—one, D. 13. 6. 5, § 3: *Et si fortā res æstimata data sit, omne periculum præstandum ab eo, qui æstimationem se præstaturum recepit*; the other, D. 19. 3. 1, § 1: *Æstimatio cūtem periculum facit ejus, qui suscepit*; aut igitur ipsam rem debet incorruptam reddere, aut æstimationem de qua convenit.

² Bailm. § 253 a.

³ The Code Civil, art. 1833, has settled that in such a case the loss shall be the borrower's if he can shew no agreement to the contrary.

⁴ Bailm. 68.

⁵ 2 Ld. Raym. 909, at 915. The rule of the Roman law was, *Qui jumenta sibi commodata longius duxerit, alienave re, invito domino, usus sit, furtum facit*: D. 47. 2. 41. In D. 13. 6. 23, the case is put of the horse being lent for a purpose for which it is unfit: *Si commodavero tibi equum, quo uteris usque ad certum locum, si nulla culpa tua interveniente, in ipso itinere deterior equus factus sit, non teneris commodati; nam ego in culpa ero qui in tam longum iter commodavi, qui eum laborem sustinere non potuit*. In the Roman law, if the borrower used the commodatum for a purpose other than that for which it was lent, he was liable to an *actio furti*: Inst. 4. 1. 6-8.

⁶ Story, Bailm. § 256. *Quidquid in rem commodatam ob morbum, vel aliam, rationem impensum est, a domino recipi potest*: Paulus, Sent. Rec. 2. 4. 1.

⁷ Story, Bailm. § 258. *Si reudita quidem sit res commodata, sed deterior redditā, non videbitur reddi'a, quæ deterior facta redditur, nisi quod interest, præstetur: proprie enim dicitur res non reddita, quæ deterior redditur*: D. 13. 6. 3, § 1.

This must be when demanded at the common law; for, as the bailment is merely gratuitous, the lender may terminate it whenever he pleases. If he does so unreasonably, and occasions any injury or loss to the borrower thereby, the latter may, perhaps, have a suit for damages, where the object of the bailment has been partly accomplished. If he retains the thing, and a suit is brought by the lender, he may insist upon the unreasonableness of the demand or the injury to himself, and thus, perhaps, he may have taken into account in the damages whatever he has lost.

If the borrower do not on demand return the thing lent, he is responsible for all losses and injuries, and even for all accidents, subsequently resulting.¹

In general the borrower's liability is limited to his own negligence, or to that of persons for whom he is responsible.² So that, if loss arises from the wrongful act of a third person which the borrower could neither foresee nor prevent, he is not responsible; and his immunity is not lost if the deterioration is the result of the use made of the loan by the borrower, provided that the use is reasonable and within the contemplation of the parties at the time of the loan.³

The obligations of the lender are lastly to be considered. "It is surprising how little in the way of decision in our Courts is to be found in our books upon the obligations which the mere lender of a chattel for use contracts towards the borrower. Pothier, in his 'Traité du Prêt à Usage,' to be found in the 4th volume of his works by Dupin, part 3, pp. 37 to 42, enters into the subject at some length; and Story also treats of it, 'Bailment,' § 275. The principles, which these two writers draw mainly from the Roman law, may be the more safely relied on as being engrafted into the common law, considering that the whole of this branch of our law is so mainly built on the Roman, as the judgment in *Coggs v. Bernard*⁴ demonstrates. It may, however, we think, be safely laid down that the duties of the borrower and lender are, in some degree, correlative. The lender must be taken to lend for the purposes of a beneficial use by the borrower; the borrower, therefore, is not responsible for reasonable wear and tear; but he is for negligence, for misuse, for gross want of skill in the use; above all, for anything which may be qualified as legal fraud. So, on the other hand, as the lender lends for beneficial

Is liable for all casualties resulting during his wrongful detention of the thing lent. But is not liable for the negligence of third persons not his agents.

Obligation of the lender.

¹ Jones, Bailm. 70; Noy, Maxims, c. 43. He is liable to hand over all gains made by him by it, which are acquired by using the *commodatum* in a way not authorized by the contract: D. 13, 6, 13, § 1.

² Jones, Bailm. 68; 2 Kent, Comm. 576.

³ Pothier, Traité du Prêt à Usage, n. 38. Cp. D. 13, 6, 23.

⁴ 2 Ld. Raym. 909; 1 Sm. L. C. (9th ed.), 201. Cp. Holmes, The Common Law, 180 *et seqq.*

use, he must be responsible for defects in the chattel, with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which directly the borrower is injured. *Adjuvari quippe nos, non decipi, beneficio oportet*, is the maxim which Story borrows from the Digest; and Potliier is express to the same effect, citing, as Story does also, the instance, *Qui sciens vasa vitiosa commodavit, si ibi infusum vinum, vel olcum corruptum effusumve est, condemnandus eo nomine est*. This is so consonant to reason and justice that it cannot but be part of our law. Would it not be monstrous to hold that, if the owner of a horse, knowing it to be vicious and unmanageable, should lend it to one who is ignorant of its bad qualities, and conceal them from him, and the rider, using ordinary care and skill, is thrown from it and injured, he should not be responsible? The principle laid down in *Coggs v. Bernard*,¹ and followed out by Lord Kenyon and Buller, J., and by Lord Tenterden in the *Nisi Prius* cases cited in the note,² that a gratuitous agent or bailee may be responsible for gross negligence or great want of skill, gets rid of the objection that might be urged from want of consideration to the lender. By the necessarily implied purpose of the loan a duty is contracted towards the borrower not to conceal from him those defects known to the lender which may make the loan perilous or unprofitable to him."³

IV. PAWN OR PLEDGE.⁴

Of the kinds of bailments we have so far considered, deposit and mandate come under Story's first class—those in which the trust is exclusively for the benefit of the bailor or of a third person; while gratuitous loan for use is to be referred to

¹ 2 Ld. Raym. 909.

² *I.e.*, in 1 Sm. L. C. (4th ed.) 162; citing *Wilkinson v. Coverdale*, 1 Esp. (N.P.) 75; *Beauchamp v. Powley*, 1 M. & Rob. 38; *Dorman v. Jenkins*, 2 A. & E. 256; *Collett v. London and North-Western Railway Company*, 16 Q. B. 984.

³ Per Coleridge, J., *Blakemore v. Bristol and Exeter Railway Company*, 8 E. & B. 1035, at 1050, discussed per Cotton, L.J., *Heaven v. Pender*, 11 Q. B. Div. 503, at 516. Most of the passage extracted in the text is quoted by Wilde, B., delivering the judgment of the Court of Exchequer, in *MacCarthy v. Young*, 6 H. & N. 329, at 336. See per Willes, J., *Indermaur v. Dames*, L. R. 1 C. P. 274, at 286. There is a case given in the civil law that may be noted. *Si rem inspectori dedi, an similis sit ei, cui commodata est queritur. Et si quidem mea causa dedi, dum volo pretium exquirere, dolum mihi tantum prestat. Si sui, et custodiam: et ideo furti habebit actionem. Sed et si dum refertur, perit, si quidem ego mandaveram per quam remitteris periculum meum erit. Si vero ipse cui voluit, commisit æque mihi culpam prestat, si sui causa accepit. Qui non tam idoneum hominem elegerit ut recte id perferri possit. Si mei causa dolum tantum: D. 13, 6, 10, § 1, 11, 12.*

⁴ There is a history of pawnbroking in Beckmann, *History of Inventions*, vol. iii. (2nd ed., 1814), 11, under title Lending Houses. See 2 Bell. Comm. (7th ed.), 19, where the law of pledge is briefly, that of hypothec, fully treated. The terms pawn and pledge, pledgor and pledgee, pawnor and pawnee, are used interchangeably throughout the pages that follow on the subject of pawnor or pledge.

the second class, in which the bailment is exclusively for the benefit of the bailee. The bailment of pawn or pledge is referred to his third class—where the trust is for the benefit of both parties, or of both or one of them and a third party.

Third class—
Where the
trust is for
the benefit of
both parties.
Pawn—
definition.

A pawn, says Sir William Jones, is “a bailment of goods by a debtor to his creditor to be kept by him till his debt is discharged.”

The contract of pledging, says Kent,¹ is “a bailment or delivery of goods by a debtor to his creditor, to be kept till the debt be discharged; or, to use the more comprehensive definition of Story, it is a bailment of personal property, as security for some debt or engagement.”²

The term “pledge” is used indifferently to denote the contract and the property which constitutes the security.

Pledge is the *pignus* of the Roman law;³ and it is from this source that most of the principles governing the subject are derived.

All kinds of personal property that are vested and tangible, and also negotiable paper, may be the subject of pledge; and *choses in action*, resting on written contract, may be assigned in pledge.⁴ It is not necessary that the pledge should belong to the pledgor; it is sufficient if it is pledged with the consent of the owner,⁵ or if the pledgor have an interest in it.⁶

What may be
the subject
of pawn.

¹ 2 Comm. 578. Turner, *The Contract of Pawn* (2nd ed.), has a chapter 25–30 on the definition of pawn.

² § 286. Cp. *Isaack v. Clark*, 2 Bulst. 306.

³ *Pignus*, in the civil law, is one of the three *jura in re aliena*, *superficies emphyteusis*, and *pignus*, which are not reckoned amongst servitudes. The doctrines of the civil law are to be found in the titles, *De pignoribus, et hypothecis, et qualiter ea contrahantur, et de pactis eorum*, D. 20, 1, and the five following titles; in the title *De pigneratitia actione vel contra*, D. 13, 7; and see Pothier, *Pandects*, lib. 20, tit. 1–6. *Pignus est quod propter rem creditam obligatur, cujusque rei possessionem solum ad tempus consequitur creditor, ceterum dominium penes debitorem est*: Isidor, *Etymologarium*, lib. v. 22. *Proprie pignus dicimus, quod ad creditorem transit; hypothecam cum non transit, nec possessio ad creditorem*: D. 13, 7, 9, § 2. *Pignus appellatum a pugno; quia res quæ pignori dantur manu traduntur; unde etiam videri potest, verum esse, quod quidam putant, pignus propriæ rei mobilis constitui*: D. 50, 16, 238. See Maynz, *Éléments de Droit Romain*, vol. ii. 279; *Du contrat de gage Pignus*; Pothier, *Traité du Contrat Nantissement*, n. 5. The civil law is, however, not wholly consistent with the foregoing definition; it says: *Pignus contrahitur non sola traditione, sed etiam nuda conventionione, etsi non traditum est. Si igitur contractum sit pignus nuda conventionione, videamus, an si quis aurum ostenderit, quasi pignori daturus, et æs dederit, obligaverit aurum pignori? Et consequens est ut aurum obligetur, non autem æs; quia in hoc non consenserint*: D. 13, 7, 1, § 1. This does not appear to be the law of England: *Donald v. Suckling*, L. R. 1 Q. B. 585.

⁴ 2 Kent, Comm. 578, citing (*inter alia*) *Roberts v. Wyatt*, 2 Taunt. 268. See an article on the pledge of shares in *Joint Stock Companies*, *Law Mag.* (1838), vol. xix. 389.

⁵ Story, *Bailm.* § 291.

⁶ *Donald v. Suckling*, L. R. 1 Q. B. 585. The general rule applicable to such cases is that of the Civil law: *Nemo plus juris ad alium transferre potest quam ipse haberet*, D. 50, 17, 54. *Nemo plus habere creditor potest, quam habet, qui pignus dedit*: D. 23, 1, 3, § 1. Pothier, *Traité du Contrat de Nantissement*, n. 27. *Code Civil*, Art. 2279.

By the civil law.

In the civil law certain things were prohibited from being pawned, such as the necessary apparel and furniture, beds, utensils, and tools of the debtor, his ploughs and other utensils for tillage, the pension or bounty of the monarch, and the pay and emoluments of officers and soldiers.¹

By the common law.

By the common law the pay—whether full or half pay—of soldiers and sailors is exempted.² By statute there are a variety of exceptions for different purposes,³ the detailed consideration of which is remote from the subject of negligence.

Capacity to enter into the contract of pawn.

The rules applicable to contracts generally determine the capacity of persons to enter into the contract of pawn.⁴

Duty of pledgor by the civil law.

The duty of the pledgor by the Civil Law is:

1. To indemnify the pledgee against all liabilities which he incurs in trying to sell the property at the best price.⁵
2. To deliver up the pledge when required for sale if it has been left in his hands on hire or as a *precarium*.⁶
3. In some cases to pay compensation, e.g., when he has pledged a *res aliena*.⁷

Duty of the pledgee by the civil law.

The duty of the pledgee is:

1. To return the property pledged when the pledge is determined.⁸
2. To give up to the pledgor all fruits derived from the pledge, or to deduct their value from the amount of the debt.⁹
3. To answer for any negligence in the custody of the pledge, and if it has been sold, to account for anything received beyond principle and interest.¹⁰

Duty of the pledgee to the pledgor by the English law.

The duty of the pledgee to the pledgor by English law is expressed in a sentence by Blackburn, J.:¹¹ "In general, all that the pledgor requires is the personal contract of the pledgee that on bringing the money the pawn shall be given up to him, and that in the meantime the pledgee shall be responsible for due care being taken for its safe custody."

¹ 1 Domat, Bk. 3, tit. 1, § 1, arts 24 to 27.

² M'Carthy v. Goold, 1 Ball & Beat. (Ir.) 389; Barwick v. Beade, 1 H. Bl. 627; Lidderdale v. Montrose, 4 T. R. 248, where an action by the assignee against the assignor on his covenant is suggested. Cp. Lucas v. Harris, 18 Q. B. Div. 127; Crowe v. Price, 22 Q. B. Div. 429.

³ See them cited, Turner, Contract of Pawn (2nd ed.), pp. 41-44.

⁴ Pollock, Contracts (6th ed.), 184.

⁵ D. 13, 7, 22, § 4.

⁶ D. 13, 7, 22, § 3. As to *precarium*, see Hunter, Roman Law (2nd ed.), 380.

⁷ D. 13, 7, 1, § 2.

⁸ D. 13, 7, 9, § 3; D. 13, 7, 20, § 2; D. 13, 7, 40, § 2.

⁹ D. 13, 7, 22, pr.; Code 4, 24, 1; Code 4, 24, 3. In the case of an estate or building an agreement might be made that the creditor *eo usque retinet possessionem pignoris loco, donec illi pecunia solvat cum in usuras fructus percipiat, aut locando, aut ipse percipiendo habitandus*: D. 20, 1, 11, § 1. This was called *antichresis*, as to which see Domat, bk. 3, tit. 1, § 1, art. 28.

¹⁰ Moyle, Just. Inst. 3, 14, 4.

¹¹ Donald v. Suckling, L. R. 1 Q. B. 585, at 615.

The common law draws a distinction between a mortgage and a pledge. By a mortgage the whole legal title passes to the mortgagee, subject to be divested on a contingency. By a pledge¹ only a special property passes while the general property remains in the pledgor,² or, as it is expressed in *Casey v. Cavaroc*:³ "The difference ordinarily recognised between a mortgage and a pledge is, that title is transferred by the former, and possession by the latter."

Distinction between mortgage, pledge, hypothecation, and lien.

Hypothecation is where a pledge is held without possession by the pledgee.⁴ The power of a master to bind a ship, says Lord Hardwicke, is called hypotheca, yet there is no delivery of possession.⁵ In the common law, says Story,⁶ the nearest approach to an hypothecation is found in the cases of holders of bottomry bonds,⁷ of material men, and of seamen for wages in the merchant service, who have a claim against the ship *in rem*.

Hypothecation.

Lastly, a pledge differs from a lien in that a lien conveys no right to sell, but only to retain till the debt in respect of which the lien was created has been satisfied.⁸

Pledge and lien distinguished.

Possession is of the essence of a pledge, and if possession be once given up, the pledge as such is extinguished.⁹ This possession need not be actual, and may be merely constructive; as where the key of a warehouse containing the goods pledged is delivered, or a bill of lading is assigned.¹⁰ There are cases where con-

Pledge requires possession.

¹ A mere pledge of chattels personal, though in writing, need not bear a mortgage stamp: *Harris v. Birch*, 9 M. & W. 591; *In re Attenborough* and the Commissioners of Inland Revenue, 11 Ex. 461. See what is said of *Harris v. Birch* in *Sewell v. Burdick*, 10 App. Cas. 74, per Lord Selborne, C., at 80.

² *Ryall v. Rowles*, 2 Wh. & T. L. C. in Eq. (6th ed.), 799; 4 Kent, Comm. 138; Story, Bailm. § 287. In the Roman law, however, *inter pignus autem et hypothecam tantum nominis sonus differt*: D. 20, 1, 5, § 1. See 2 Spence, Eq. Jur. 771.

³ 66 U. S. (6 Otto) 467, at 477.

⁴ D. 13, 7, 9, § 2, *supra*, n. 2; Inst. 4, 6, 7.

⁵ *Ryall v. Rowles*, 2 Wh. & T. L. C. in Eq. (6th ed.), 799, at 810. *Sewell v. Burdick*, 13 Q. B. Div. 159, per Bowen, L.J., at 175, 10 App. Cas. 74, per Lord Blackburn, at 95.

⁶ Bailm. § 288.

⁷ The *Gratitudine*, 3 C. Rob. (Adm.) 240, Tudor, L. C. Merc. Law (3rd ed.), 34.

⁸ "A lien is a personal right, and cannot be transferred to another": per Buller, J., *Daubigny v. Duval*, 5 T. R. 604, at 606. See also *McCombie v. Davies*, 7 East, 5, per Lord Ellenborough, at 6; *Mulliner v. Florence*, 3 Q. B. Div. 484; *Jones v. Pearle*, 1 Str. 557, where it was held that, except by the custom of London, an innkeeper has no right to sell horses on which he has a lien for their keeping. In *Lickbarrow v. Mason*, 6 East, 20 n, at 21, Buller, J., having distinguished the owner of goods from one having a lien on them, says, at 27: "he who has a lien only on goods has no right so to do [i.e., sell or dispose of the goods as he pleases]; he can only retain them till the original price be paid."

⁹ Pothier, De Nantissement, 8. "Possession," says Erle, C.J., *Martin v. Reid*, 11 C. B. N. S. 730, at 735, "is an equivocal term; it may mean either actual manual possession or the mere right of possession." See 2 Kent, Comm. 581, with Mr. Holmes's note to 12th ed., Pledge.

¹⁰ *Pignus, manente proprietate debitoris, solam possessionem transfert ad creditorem: prestat tamen et precario et pro conducto debitor re sua uti*: D. 13, 7, 35, § 1. *Si pignus mihi traditum locassem domino, per locationem retineo possessionem: quia, antequam conducere debitor, non fuerit ejus possessio; cum et animus mihi retinendi sit, et conducenti non sit animus possessionem apiscendi*: D. 13, 7, 57. For a series of French decisions on the proposition that possession by the creditor is not incompatible with a certain co-operation of the debtor for the conservation of the pledged, see *Casey*

structive delivery draws with it a transfer of the property ; as, for instance, the assignment of a bill of lading which is necessary to give constructive possession, yet which transfers the title also. The effect of this is to unite two different forms of security—mortgage and pledge. There is a mortgage by virtue of the title, a pledge by virtue of the possession. The same is the case with the transfer of notes and bills.

Effect of temporary resumption of possession by the owner for a special purpose.

Reeves v. Capper.

A re-delivery for a mere temporary purpose, as for shoeing a horse which has been pledged and is owned by the farrier, or for repairing a carriage which has been pledged and is owned by the carriagemaker, does not amount to an interruption of the pledgee's possession. The owner is but a mere special bailee for the creditor.¹ The possession of the pledge remains in the eye of the law in the pledgee, although actually delivered back to the pledgor. Thus when the debtor, who is also the pledgor, is employed in the service of the creditor, who is at the same time the pledgee, the pledgor's temporary use of the pledged article in the pledgee's business, does not effect a restoration of the possession to the pledgor. This is very clearly put in *Reeves v. Capper*.² Wilson, captain of a ship, pledged his chronometer, then in the possession of the makers, to defendants, the owners of the ship, in consideration of their advancing him £50, and allowing him the use of the instrument during a voyage on which he was about to depart. After the voyage he placed it at the makers, and while there pledged it to plaintiff, for whom the makers, being ignorant of the pledge to defendants, agreed to hold it. The money advanced by defendants not having been repaid, it was held that the property in the instrument was in the defendants, the shipowners. Tindal, C.J., thus explains the principle applicable: "We agree entirely with the doctrine laid down in *Ryall v. Rolle*,³ that in the case of a simple pawn of a personal chattel, if the creditor parts with the possession he loses his property in the pledge ; but we think the delivery of the chronometer to Wilson, under the terms of the agreement itself, was not a parting with the possession, but that the possession of Captain Wilson was still the possession of Messrs. Capper ;" "just as the possession of plate by a butler is the possession of the master ; and the delivery over to the plaintiff was, as between Captain Wilson and the defendants, a wrongful act, just as the

v. Cavaroc, 96 U. S. (6 Otto) 467. *Babcock v. Lawson*, 5 Q. B. D. 284, was a case of possession obtained by fraud of the pledgor.

¹ *Casey v. Cavaroc*, 96 U. S. (6 Otto) 467 ; 2 Bell, Comm. (7th ed.), 22.

² 5 Bing. N. C. 136. See *Bateman v. Green*, Ir. R. 2 C. L. 166, per O'Brien, J., at 191, in Ex. Ch. 607 per Monahan, C.J., at 611, affd. H. L. 18th June 1872 (not reported), *sub nom.* *London Financial Association Ltd. v. Bateman*.

³ 1 Atk. 165.

delivery over of the plate by the butler to a stranger would have been; and could give no more right to the bailee than Captain Wilson had himself."¹

A delivery to the pledgor with a power of substituting (where the debtor is in possession) other securities is, however, not such a delivery as will prevail against the rights of third persons. The presumption of law is that those who deal with the pledgor do so on the faith of his being the unqualified owner of the goods. Bad faith will thus defeat a pledge, though coupled with possession; yet want of possession is equally fatal, though the parties have acted in good faith. To constitute a valid pledge then, both possession, and possession in good faith, are requisite.²

Delivery with power of substituting other securities.

Delivery, we have seen, is essential to the constitution of a pledge; and may be effected without physical change of the possession of the goods.³

Delivery effected without physical change of possession.

Till possession is given the intended pledgee has only a right of action on the contract and no interest in the thing itself.⁴ Constructive or symbolical delivery of possession is, however, sufficient when actual possession cannot be given.⁵ By the civil law, a contract to deliver operated on the property; and property of which a man had neither a present possession nor a present title, and which might be acquired by him *in futuro*, might be the subject of a valid pledge.⁶

A pawn may be sold to defray the debt for which it is a security.⁷ This right of sale is at common law subject to certain regulations. If the pledge is for an indefinite time, the creditor may at any time call upon the debtor to redeem. In such a case the pawnor has his whole lifetime in which to redeem,⁸ unless the creditor in the meantime exercises his right of calling

Incidents of pawn.

¹ By the civil law, where property is already in the hands of the pledgee, as on a loan or on deposit, a species of tradition known as *brevis manus* is feigned, the effect of which is that the pledgee is taken to have yielded up his possession by way of loan or deposit and simultaneously to have received it again as pledge: Pothier, *Traité du Contrat de Nantissement*, 8.

² *Casey v. Cavaroc*, 96 U. S. (6 Otto) 467, at 490. "The requirement of possession is an inexorable rule of law, adopted to prevent fraud and deception; for, if the debtor remains in possession, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods."

³ *Mills v. Charlesworth*, 25 Q. B. Div. 421; *Grigg v. National Guardian Insurance Company* (1891), 3 Ch. 206.

⁴ *Howes v. Ball*, 7 B. & C. 481.

⁵ Per Bowen, L.J., *Burdick v. Sewell*, 13 Q. B. Div. 159, at 174. For what is constructive delivery, *Hilton v. Tucker*, 39 Ch. D. 669. See also *Donald v. Suckling*, L. R. 1 Q. B. 585, per Blackburn, J., at 613.

⁶ D. 20, 1, 15.

⁷ *Ant.*, 939. *Pothionier v. Dawson*, Holt (N. P.), 383, per Gibbs, C.J., at 385; *Burdick v. Sewell*, 10 Q. B. D. 363, per Field, J., at 367; *Story*, Agency, § 350; *Ex parte Hubbard*, 17 Q. B. Div. 690, per Bowen, L.J., at 698.

⁸ *Kemp v. Westbrook*, 1 Ves. Sen. 278; *Cortelyou v. Lansing*, 2 Caines (Cases in Error) 200; *Garlick v. James*, 12 Johns. (Sup. Ct. N. Y.) 146. As to the benefit of a bonus, *Vaughan v. Wood*, 1 My. & K. 403.

on him to do so; then, if, upon proper demand and notice,¹ he fail to redeem his right is subject to be divested. If he dies without such call being made, the right to recover descends to his personal representatives.² When the pawn is for a stipulated time, and the debt is not paid at the time, the absolute property does not pass to the pledgee. At the expiration of the time stipulated for, he has his right to sell; if he does not exercise this right he still retains the property as a pledge, and upon a tender of the debt he may at any time be compelled to restore it (for the Statute of Limitations does not apply to the case of a pawn³), because the creditor holds not in his own, but in another's right.⁴ It follows that if the creditor puts up the pawn for sale and purchases it himself, the pledgor has a right to treat the sale as invalid. The sale being voidable merely, there must be some period within which the pledgor must make his election whether he will avoid it or not. He will not be allowed to wait and to speculate upon the changes of the market; his intention will have to be declared with reasonable promptitude;⁵ and this is a matter as to which the Court will direct.

Pawn a collateral security.

The pawn, moreover, is only a collateral security, and, after the debt is due, the pawnee may at any time proceed personally against the pawnor for his debt, without selling the pawn.⁶ On the other hand, if there be a conversion of the pawn by the pawnee, and the pawnor has recovered judgment for the value, the debt remains, and is recoverable—if, that is, the amount has been deducted from the damages in the action about the pawn.⁷

How pawn may be realized.

If the pawnee prefer to assert his right in the pawn, he may do so in one of two ways. He may either commence proceedings in Chancery and obtain a decree of foreclosure—and this has frequently been done in the case of stocks, bonds, plate, and other chattels pledged for the payment of the debt; or he may sell without judicial process, upon giving reasonable notice to the debtor to redeem. But he is not allowed to become a purchaser

¹ *Figot v. Cubley*, 15 C. B. N. S. 701.

² See the authorities reviewed by Kent, J., in *Cortelyou v. Lansing*, 2 Caines (Cases in Error), 200, at 203.

³ *Kemp v. Westbrook*, 1 Ves. Sen. 278; *Gage v. Bulkeley*, Ridg. Cas. temp. Hard. 278. It would seem that the pawnor may be debarred by acquiescence: *Jones v. Higgins*, L. R. 2 Eq. 538. See *Spears v. Hartly*, 3 Esp. (N. P.) 81.

⁴ D. 41, 3, 13, pr.: *Pignori rem acceptam usu non capimus; quia pro alieno possidemus*.

⁵ *Hayward v. National Bank*, 96 U. S. (6 Otto) 611; *Hill v. Finigau*, 11 Am. St. R. 279.

⁶ *Dobree v. Norcliffe*, 23 L. T. (N. S.) 552; *Jones v. Marshall*, 24 Q. B. D. 269.

⁷ *Bac. Abr. Bailment (B)*; *Ratcliffe v. Davis*, Yelv. 179, which is examined at length by Kent, J., in *Cortelyou v. Lansing*, 2 Caines (Cases in Error), 200, at 205, 208; *Johnson v. Stear*, 15 C. B. N. S. 330; *Brierley v. Kendall*, 17 Q. B. 937; *Donald v. Suckling*, L. R. 1 Q. B. 585, at 595.

at the sale. On the other hand, the pawnee cannot be compelled to sell, except by process in equity ;¹ nor, according to an American case, if the subject of the pledge is divisible, may he sell more than it is necessary to satisfy his debt.²

The pawnor can, at any time while the pawn remains with the pawnee, sell his interest in the pawn, subject, of course, to the rights of the pawnee,³ for he continues to have a property in the article pledged that he can convey to a third person, though he has no right to the goods without paying off the debt. Until the debt is paid off the pawnor has no present interest. Even before the Judicature Acts an assignment by the pawnor gave to the assignee the full rights of the pawnor both in law and equity.⁴ If, however, a tenant for life pawns plate, on his death with the pawn unredeemed, the pawnbroker has no right to it as against the remainder man, although the pawnbroker has no notice of any settlement.⁵

Since the contract of pledge is only collateral to the contract to pay the debt, the promise is to return the property pledged when the debt is paid ; and since, as we have seen,⁶ the pawnee can maintain an action to recover the debt without any offer to restore the property pledged,⁷ he can maintain an action for money lent, even after he has converted the property pledged, by an unlawful sale, and can recover the amount of the debt, less the amount realized by the sale, if the defendant plead this in set-off.⁸ Therefore to enable the pawnor to maintain trover for a conversion of property pledged, if the lien created by the pawn has not otherwise been discharged, a tender of payment of the debt is requisite. Though the point has never definitely been decided, the inclination of opinion seems to be to require a tender good at common law.⁹

Pawnor may sell his interest in the pawn at any time.

When pawnor can maintain trover.

Tender of payment of debt requisite.

¹ Story, Bailm. § 320.

² Fitzgerald v. Blocher, 29 Am. R. 3.

³ Tucker v. Wilson, 1 P. Wms. 261, in H. L. *sub nom.* Wilson v. Tooker, 5 Bro. P. C. 193; Lockwood v. Ewer, 2 Atk. 303; 2 Kent Comm. 581; Story, Bailm. §§ 308, 310, 314, 315, 316, 318, 319; Turner. Pawns (2nd ed.), 169, 170. Under the Code Civil, art. 2078, a judicial order is required as in the case of an English mortgage of land.

⁴ Kemp v. Westbrook, 1 Ves. Sen. 278; Franklin v. Neate, 13 M. & W. 481.

⁵ Hoare v. Parker, 2 T. R. 376.

⁶ Taylor v. Cheever, 72 Mass. 146.

⁷ Fay v. Gray, 124 Mass. 500.

⁸ Cummock v. Newburyport Savings Institution, 142 Mass. 342, where the authorities are reviewed. "A conditional tender is not an effectual tender in law, but a tender under protest is quite right. A man has a right to tender money reserving all his rights, and such a tender is good provided he does not seek to impose conditions": per Bowen, L.J., Greenwood v. Sutcliffe (1892), 1 Ch. 1, at 11. "I take it to be clear beyond a doubt, that if the debtor tenders a larger sum of money than is due, and asks for change, this will be a good tender, if the creditor does not object to it on that account, but only demands a larger sum": per Lord Kenyon, C.J., Black v. Smith, Peake, (N.P.) 88, at 89; see also Cole v. Blake, Peake (N.P.), 238. Tender is considered at length in the American case, Loughborough v. McNevin, 5 Am. St. R. 435. See Bullen v. Leake Prec. of Plead. (3rd ed.) 693; Birks v. Trippet, 1 Wms. Saund. 32, at 33d.

⁹ Ante, 942.

Pawnee's unauthorized dealing with pawn.

If the pawnee deals with the pawn in a manner other than is allowed by law for the payment of his debt, then, in so far as by dealing with the interest of the pawnor he puts a difficulty in his way in obtaining possession of the pawn on payment of the money due, he commits an actionable wrong,¹ though not to the extent (as has sometimes been contended, on the supposed analogy of a factor pledging goods entrusted to him at common law) of wholly invalidating his title, and thereby rendering his possession of the goods wrongful²—so as to enable the pledgor, without any tender of the amount of the debt to maintain an action for the whole value of the chattel without any allowance for the special property.

Distinction between irregular dealings with pawn and inconsistent dealings.

The distinction between the case just noted of a pawnee dealing irregularly with the pawn, and the case of a pawnee dealing with a pawn inconsistently, as by destroying it or selling it, has been pointed out by Blackburn, J., in *Donald v. Suckling*,³ to be between “those cases where the act complained of was wholly repugnant to the holding” and those cases “where the act, though unauthorized, is not so repugnant to the contract as to shew a disclaimer.”

In a Massachusetts' case⁴ the question was raised whether a pawn could be detained for any other debt than that for which it was made. The weight of opinion, and also, it would seem, of reason, is against such a power of retention in the absence of agreement or such circumstances as make the retention of the pawn an inducement fostered by the borrower for further advances. Nevertheless the rule of the civil law and the law of Scotland seem to permit this retention.⁵

Sale by pawnee.

If the pawnee sell, and there is a surplus, it belongs to the pawnor; if a deficiency, it is chargeable to the pawnor.⁶

Goods pawned exempt from distress.

Goods, says William, J., in *Swire v. Leach*,⁷ entrusted to a “pawnbroker to be taken care of and dealt with by him in the way of his trade, like goods deposited with a wharfinger to be kept,⁸ or with an auctioneer for sale,⁹ or beasts sent to a carcass-

¹ *Lee v. Atkinson*, Yelv. 172.

² *Halliday v. Holgate*, L. R. 3 Ex. (Ex. Ch.) 299; *Mulliner v. Florence*, 3 Q. B. D. 484.

³ L. R. 1 Q. B. 585, at 615.

⁴ *Jarvis v. Rogers*, 15 Mass. 369. Cp. *First National Bank v. O'Connell*, 35 Am. St. R. 313, where the duty in regard to collateral securities is considered.

⁵ 2 Bell, Comm. (7th ed.), 22, referring to 1 Bell, Comm. 725, where the principle is more plainly stated. The view expressed in the text is that of 2 Kent, Comm. 585. Code 8, 27; Pothier, *Traité du Contrat de Nantissement*, n. 47, which is clear as to the Roman law.

⁶ *South Sea Company v. Duncomb*, 2 Str. 919.

⁷ 18 C. B. N. S. 479, at 493.

⁸ *Thompson v. Mashiter*, 1 Bing. 283.

⁹ *Adams v. Grane*, 1 C. & M. 380. This privilege is confined to goods on the auctioneer's premises for the purpose of sale: *Lyons v. Elliott*, 1 Q. B. D. 210.

butcher to be slaughtered and dressed,"¹ are privileged from distress for rent. The ground of this exemption is that they are delivered to him in the way of his trade, and his duty is "to keep safely all goods pledged with him, and to restore them on demand to the owner, on being paid the money he has advanced upon them, and interest."²

Goods pawned are not liable, says Story, to be taken in execution in an action against the pawnor; at least until the sum for which they are pawned is paid.³ The converse case is of some interest—whether, in the case of a pawn, the property can be levied on under an execution by a creditor of the pledgee. "The general rule of law," says Parke, B., in *Legg v. Evans*,⁴ "is that the sheriff can seize only such things as he can sell." The particular case of which he was speaking was that of a lien. "It is clear, therefore," he continues, "that the sheriff cannot sell an interest of this description, which is a mere personal interest in

Not liable to be taken in execution.

¹ *Brown v. Shevill*, 2 A. & E. 138.

² *Simpson v. Hartopp*, Willes (C. P.) 512, 1 Sm. L. C. (9th ed.), 463, at 465; *Gorton v. Falkner*, 4 T. R. 565. There are five sorts of things not distrainable at common law:—1. Things annexed to the freehold: *Hellawell v. Eastwood*, 6 Ex. 295, at 311; *Holland v. Hodgson*, L. R. 7 C. P. 328; *Sheffield and South Yorkshire Permanent Building Society v. Harrison*, 15 Q. B. D. 358; see, for chattels real and fixtures, 2 Kent, Comm. 342–347, with notes to 13th ed. 2. Things delivered to a person exercising a public trade to be carried, wrought, worked up, or managed in the way of his trade or employ: *Gisbourn v. Hurst*, 1 Salk. 249; *Gibson v. Ireson*, 3 Q. B. 39; *Clarke v. Millwall Dock Company*, 17 Q. B. Div. 494; *Von Knoop v. Moss*, 7 Times L. R. 500. 3. Cocks or sheaves of corn: *Wilson v. Duckett*, 2 Mod. 61, where it is also said that a replevin will not lie for money out of a bag or chest. *Morley v. Pincombe*, 2 Ex. 101, explains the principle on which such things are not distrainable to be that they cannot be restored upon a replevin in the same condition in which they were when taken; but see 2 W. & M. c. 5, s. 3, and per Parke, B., in *Piggott v. Birtles*, 1 M. & W. 441, at 448, also 46 & 47 Vict. c. 61, ss. 51, 52, and 51 & 52 Vict. c. 21, ss. 5, 6. 4. Beasts of the plough and instruments of husbandry: *Davies v. Aston*, 1 C. B. 746. 5. The instruments of a man's trade or profession: *Com. Dig. Distress (C)*; *Fenton v. Logan*, 9 Bing. 676; *Nargett v. Nias*, 1 E. & E. 439; 51 & 52 Vict. c. 21, s. 4. The first three sorts were absolutely free from distress, the last two only on the supposition that there was no other distress besides. See *Co. Litt. 47*; *Storey v. Robinson*, 6 T. R. 138; *The Agricultural Holdings Act, 1883* (46 & 47 Vict. c. 61), s. 45; *London and Yorkshire Bank v. Belton*, 15 Q. B. D. 457; also *The Lodgers' Goods Protection Act, 34 & 35 Vict. c. 79*, ss. 1, 2; 46 & 47 Vict. c. 61, ss. 44–52, as to limitation of right to distrain; 46 & 47 Vict. c. 52, s. 42, as to landlord's power to distrain, limited by 53 & 54 Vict. c. 71, s. 28; and *Bullen, Law of Distress*, 90–104.

³ *Story, Bailm. § 353. Vin. Abr. Pawn (A) 3. Bro. Abr. Pledges, 28.* The article on pledges in *Brooke* is not in alphabetical order, and comes immediately after "Plaints," and immediately before "Pleadings." *Rogers v. Kennay*, 15 L. J. Q. B. 381. *Stief v. Hart*, 1 N. Y. 20, which is cited in an editor's note to *Story* as contrary, is really a strong authority in favour of the proposition in the text; see judgment of *Jewett, C.J.*, at 28; of *Gray, J.*, at 36; of *Wright, J.*, at 39. The actual decision in that case turned on the modifications of the common law effected by the Revised Statutes of New York. The principle applied was that enunciated in 1 Kent, Comm. 464; whenever a power is given by a statute everything necessary to the making of it effectual or requisite to attain the end is implied. *Quando lex aliquid concedit, concedere videtur et id, per quod devenitur ad illud.* Kent's rules for the interpretation of statutes, 1 Kent, Comm. 460–469, may with advantage be referred to. In 12 Co. Rep. 130, Oath expressed before Justices, at 131, the maxim is expressed *quando lex aliquid concedit, conceditur et id sine quo res ipsa esse non potest.* Cp. per Parke, B., *Clarence Railway Company v. Great North of England, &c., Railway Company*, 13 M. & W. 706, at 721; *Hardcastle, Statutes* (2nd ed.), 271.

⁴ 6 M. & W. 36, at 41.

the goods. The case is quite different from those referred to in which goods were let on hire for a certain period, because there the person hiring has the absolute use of the goods for a particular term, and that interest may be disposed of." The question, then, resolves itself into an inquiry to which class a pledge belongs. Thus tested, there appears to be a property in the goods in the pawnee *to the extent of the amount* of the pawn, and subject to the repayment of the amount, which is analogous to the interest *to the extent of a time certain*, in the case of goods hired.¹ The conclusion therefore is that they may be taken in execution, subject to the pawnor's interest and right of redemption; and North, J., has held accordingly *In re Rollason*, Halse's claim.²

Statutory enactments.

So far we have considered the subject of pawns apart from statute. Various regulations, however, are made by the Pawnbrokers Act, 1872,³ which applies to every loan by a pawnbroker of forty shillings or under and to every loan by a pawnbroker of above forty shillings and not above ten pounds, except as in the Act is otherwise provided.⁴ These regulations, very important with regard to the law of pawns, generally have no special reference to negligence, and may therefore safely here be thus slightly referred to.

Use of pawn by pawnee.

The questions, whether the pawnee may make use of the pawn in any and what circumstances, and what degree of care is to be exercised by him if he does in any case use the pawn, have been already considered with regard to Deposit,⁵ and the conclusions there arrived at hold good here also; as Holt, C.J.,⁶ explains, "because the pawn is in the nature of a deposit, and, as such, is not liable to be used. And to this effect is Owen, 123."

Degree of diligence.

We now come to the consideration of the degree of diligence imposed upon the pawnee in respect to the preservation of the pawn.

Holt, C.J., in *Coggs v. Bernard*.

As to this point, says Holt, C.J.,⁷ "Bracton, 99 b, gives you the answer: *Creditor, qui pignus accepit, re obligatur, et ad illam restituendam tenetur; et cum hujusmodi res in pignus data sit utriusque gratia, scilicet debitoris, quo magis ei pecunia crederetur, et creditoris quo magis [et] in tuto sit creditum, sufficit ad ejus rei custodiam diligentiam exactam adhibere, quam si præstiterit et rem*

¹ 2 Kent, Comm. 578.

² 34 Ch. D. 495.

³ 35 & 36 Vict. c. 93. By the Act there is nothing to exclude the common law right of the pawnbroker to recover whatever sum he may have advanced beyond the value of the pledge: *Jones v. Marshall*, 24 Q. B. D. 269.

⁴ Sec. 10.

⁵ *Ante*, 916.

⁶ 2 Ld. Raym. 909, at 917; 1 Sm. L. C. (9th ed.), 201, at 214.

⁷ *Mores v. Conham*.

⁸ 2 Ld. Raym. 909, at 917, 1 Sm. L. C. (9th ed.), 201, at 214.

*casu amiserit, securus esse possit nec impediatur creditum petere.*¹

In effect, if a creditor takes a pawn he is bound to restore it upon the payment of the debt; but yet it is sufficient, if the pawnee use true diligence, and he will be indemnified in so doing, and notwithstanding the loss, yet he shall resort to the pawnor for his debt. Agreeable to this is 29 Ass. 28, and Southcote's Case is. But, indeed, the reason given in Southcote's Case is, because the pawnee has a special property in the pawn. But that is not the reason of the case; and there is another reason given for it in the Book of Assize, which is, indeed, the true reason of all these cases, that the law requires nothing extraordinary of the pawnee, but only that he shall use an ordinary care for restoring the goods. But, indeed, if the money for which the goods were pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them; because the pawnee, by detaining them after the tender of the money, is a wrongdoer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined. And a man that keeps goods by wrong, must be answerable for them at all events, for the detaining them, by him, is the reason of the loss. Upon the same difference as the law is in relation to pawns, it will be found to stand in relation to goods found."

It is under this head that Sir William Jones discusses the question how far theft, as contradistinguished from robbery, is a valid excuse for bailees. This point we have already considered under the head of Deposit;² and the conclusion there arrived at, that theft is not in itself evidence of negligence though circumstances of the theft may shew negligence, holds good also in this connection.³ A pawnee has been held not liable, in the absence of negligence, for a theft of a pledge by his servant.⁴

Responsibility
for theft.

The pawnee is liable for negligence by omission as well as by commission. For he is bound actively to do everything that is expected of a prudent man and necessary for the preservation of the pledge.⁵ "He is not, therefore, less liable if by his neglect he suffers a mirror which is pawned to him to be ruined or lost than he would if he had broken it by an improper use or even by a mere wilful act." A person holding property or securities in

Pawnee liable
for nonfeasance
as well as for
misfeasance.

¹ This is almost in the words of the Institutes, 3, 14, 4. *Ea igitur quæ diligens paterfamilias in suis rebus præstare solet, a creditore exiguntur*: D. 13, 7, 14.

² *Ante*, 901.

³ See 2 Kent, Comm. 580; Bro. Abr. Bailment, 7, on the authority of the case cited by Holt, C.J. from Lib. Ass. 29. E. III. pl. 28; White's Case, Dyer 158 b; Vere v. Smith, 1 Vent. 121; Clarke v. Earnshaw, Gow (N. P.), 30.

⁴ *Armfield v. Mercer*, 2 Times L. R. 764. Cp. Vin. Abr. Pawn (G), Lost or Damaged; Com. Dig. Mortgage (A), Mortgage by Pledge of Goods.

⁵ Story, Bailm. § 342, adopting the illustration used by Pothier, *Traité du Contrat de Nantissement*, n. 33. In n. 34, treating of the degree of care exacted of the pawnee,

pledge occupies the relation of trustee for the owner, and as such, in the absence of special power to do otherwise, is bound to proceed as a prudent owner would with his own. Therefore, when a promissory note is pledged, the pledgee must collect it at maturity, and is not entitled to sell it.¹ This language of an American case is perhaps not minutely accurate, though substantially so, with regard to English law, where, whatever the theory, the degree of care required of trustees is, as worked out in a court of law, greater than what an ordinary prudent owner would be expected to use with his own property—is, in fact, what a specially careful and prudent owner would be expected to use; otherwise the rules for trustees' investments would not be strict as they are.²

Pledge taken
away by
superior force.

In an American case,³ where securities were taken from a bank in the course of carrying out measures necessitated by the civil war, and for which the pledgor sued, the pledgees were exonerated and their liability thus expressed: "It was the duty of the bank to return the pledge, or shew a good reason why it could not be returned. This it has done by proof, that without any fault on its part, and against its protest, the pledge was taken from it by superior force. Where this is the case, the common as well as the civil law holds that the duty of the pledgee is discharged."

Rules as to use
of a pawn by
the pawnee.

We have considered under the head of Deposit the question whether there may or may not be an implied consent on the part of the owner to the use of the thing deposited.⁴ In the case of a pawn the rules seem somewhat different. Story states them as follows: (1) If the pawn is of such a nature that the due preservation of it requires some use, there such use is not only justifiable, but it is indispensable to the faithful discharge of the duty of the pawnee.⁵ (2) If the pawn is of such a nature that it will be worse for the use, such, for instance, as the wearing of clothes which are deposited, there the use is prohibited to the pawnee.⁶ (3) If the pawn is of such a nature that the keeping is a charge

Pothier says: *On ne doit pas exiger de lui exactissimam diligentiam, dont peu de personnes sont capables, et il n'est tenu que de la faute qu'on appelle légère, de levi culpa; il n'est pas tenu de levisimâ culpâ.* And at the end of the section he adds: *et qu'au contraire les autres contrats parmi lesquels le contrat de nantissement est rapporté, ne demandent qu'un soin ordinaire, et que le débiteur n'y est en conséquence tenu que de levi culpâ, et non de levisimâ culpâ.*

¹ Joliet Iron Company v. Scioto Fire Brick Company, 25 Am. R. 341; Story, Bailm. § 321.

² Cp. as to diligence of pledgee. *Montague v. Stelts*, 34 Am. St. R. 736.

³ *McLemore v. Louisiana State Bank*, 91 U. S. (1 Otto) 27, per Davis, J., at 29, citing 2 Kent, Comm. 579; Story, Bailm. § 339; and *Commercial Bank v. Martin*, 1 La. Ann. 344.

⁴ *Ante*, 916.

⁵ Jones, Bailm. 81.

⁶ Anon. 2 Salk. 522; *Coggs v. Bernard*, 2 Ld. Raym. 909, at 916, 1 Sm. L. C. (9th ed.) 201; *Mores v. Conham*, Owen 123, at 124.

to the pawnee, as if it is a cow or a horse, there the pawnee may milk the cow and use the milk, and ride the horse by way of recompense (as it is said) for the keeping.¹ (4) If the use will be beneficial to the pawn, or it is indifferent, there it seems the pawnee may use it.² (5) If the use will be without injury, and yet the pawn will thereby be exposed to extraordinary perils, there the use is impliedly interdicted.³

Holt, C.J.,⁴ says that jewels, earrings, or bracelets pawned to a lady may be used by her; though the use is at her peril, because she is at no charge in keeping the pawn, and "if she wears them abroad and is there robbed, she will be answerable." To this Story⁵ replies: "The reason here given, so far from proving that the pledgee may lawfully use the jewels, expressly negatives any such right. And, unless the contrary is expressly agreed, it may fairly be presumed, that the owner of such a pawn would not assent to the jewels being used as a personal ornament, and thereby exposed to unnecessary and extraordinary perils." The opinion of Story seems the more just, since family jewels might not improbably be the subject of similar considerations to those pointed out in *Duke of Somerset v. Cookson*⁶ and *Pusey v. Pusey*;⁷ it is not only that the risk to the pawnor is increased, but that the responsibility of the pawnee would be a wholly inadequate safeguard against their loss, or, if they were lost, would afford no sufficient means of compensation for articles either unique or priceless.

So much, then, on the general principles of liability for negligence of the pawnee. There are, besides, duties owing by the pawnor to the pawnee, which we are now shortly to consider.

A pawnor, by the act of pawning, impliedly engages that he is the owner of the property pawned, and, unless he gives notice of a different interest, that he is the general owner, and that he has a good right to pass the property in the pawn.⁸ He is bound to good faith, and is responsible for all fraud, both in the title and in the inception of the contract;⁹ although he does not warrant the property, *Si sciens creditor accipiat vel alienum, vel obligatum, vel morbosum, contrarium ei non competet*.¹⁰

¹ Kent, 2 Comm. 578, says, if the pledgee "derives any profit from the pledge, he must apply those profits towards his debt." Story, Bailm. § 329, n. 6 (8th ed.), disputes this citing, *Mores v. Conham*, Owen 123, and referring to other cases and the Abridgments under Distress.

² Jones, Bailm. 81. See *Thompson v. Patrick*, 4 Watts (Pa.) 414, where besides holding that a pawnee may use the pawn provided it is not the worse for it, it is added that if he uses it tortiously he is answerable by action only, and his lien is not thereby forfeited.

³ *Coggs v. Bernard*, 2 Ld. Raym. 909, at 917, approved by Sir Wm. Jones, Bailm. 81.

⁴ Bailm. § 330.

⁵ 3 P. Wms. 390.

⁶ Story, Bailm. § 354.

⁷ D. 13, 7, 16, § 1.

⁸ Story, Bailm. § 329, at 330.

⁹ *Story, Bailm. § 329, at 330.*

¹⁰ *Story, Bailm. § 354.*

Duties owing by the pawnor to the pawnee.

Wearing jewels pawned.

Expenses of
the pawnee
incurred on
the pawn.

By the civil law the pawnor is also to reimburse the pawnee all expenses and charges which have been necessarily incurred by the latter in the preservation of the pawn, even if the benefit results through the happening of some subsequent accident. Story¹ finds no decision in the common law on the point. He is of opinion that, in the case of an express contract to pay ordinary charges and expenses, its terms ought to govern; where there is no express declaration, an implication, if it arise, should have the same effect. Independently of the justice of this conclusion, it seems, he says, "reasonable that extraordinary expenses and charges which could not have been foreseen should be reimbursed by the pawnor."

Decision
under the
Pawnbroker's
Act, 1872.

The Pawnbrokers Act, 1872,² has already been noticed. By it the earlier Acts relating to pawns and those making a business of pawning are repealed and consolidated.³ A decision under the principal of these⁴ calls for notice. In *Syred v. Caruthers*⁵ the Queen's Bench held that there is no *prima facie* presumption that a fire on the premises of a pawnbroker, by which a pledge in his possession is destroyed, is caused through the default, neglect, or wilful misbehaviour of the pawnbroker so as to authorize the pawnor to obtain compensation under the Act. By section 27, however, the pawnbroker is put under an absolute liability to make good, subject to certain deductions, the value, to be ascertained as therein directed, of pledges damaged or destroyed by fire; and he is by the same section empowered to insure to the extent of such value.⁶

V. THE CONTRACT OF HIRE.

Third class—
Where the
trust is for the
benefit of both
parties.
Contract
of hire.

To Story's third class of bailments—that in which the trust is for the benefit of both parties, or of both or one of them and a third person—is to be referred the contract of hire, equally with that of pawn, which we have just been considering.

The designation of this contract in the civil law is *locatio conductio*. The definition of it is, "*Locatio conductio est contractus quo de re fruenda vel facienda pro certo pretio convenit.*"⁷ *Igitur*

¹ Bailm. § 357.

² 35 & 36 Vict. c. 93.

³ The old Act, 1 Jac. I. c. 21 as to the liabilities of pawnbrokers, is finally and completely repealed by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 60.

⁴ 39 & 40 Geo. III. c. 99, s. 24.

⁵ E. B. & E. 469. As to liability for accidental fire, see also 14 Geo. III. c. 78, s. 86, *ante* 594 *et seqq.*

⁶ As to theft by the servant of a pawnbroker, see *Armfield v. Mercer*, 2 Times L. R. 764. For an exhaustive note on the law of pledge, see *Luckett v. Townsend*, 49 Am. Dec. 730-738. For the pawnbroker's liability for burglary where he has left his house unprotected, *Shackell v. West*, 2 E. & E. 326. See also Bell, *Principles of the Law of Scotland* (9th ed.), 135.

⁷ Pothier, *Pand. lib. 19, tit. 2, part 1, art. 1. § 1. Locatio et conductio proxima est*

tria duntaxat hunc contractum constituunt: res quæ fruenda aut facienda conceditur, pretium¹ quo pro ea fruenda aut facienda dari convenit, et consensus circa supra dicta.²

It was ordinarily essential for the *pretium* to be paid in money. Ordinarily *pretium* to be paid in money. In the case of productive property, however, as a farm or farm stock, payment might by agreement be in the fruits or increase. Mommsen's opinion is that "the payment must necessarily consist in money; in consequence of which the produce lease among the Romans comes under the contingencies occurring in practical life, though not falling within the theory of jurisprudence."³ Other commentators do not assent to this view.⁴

The employer who gives the reward is called *locator operis*, the letter of the work, but *conductor operarum*, the hirer of the labour and services. On the other hand, the party who receives the pay is called *locator operarum*, the letter of the labour and services, but *conductor operis*, the hirer of the work.⁵ Definitions.

Kent's definition of this contract is "a contract by which the use of a thing or labour or services about it are stipulated to be given for a reasonable compensation, express or implied."⁶ Kent's definition.

emptio et venditio; huiusmodi juris regulis constitit. Nam ut emptio et venditio ita contrahitur, si de pretio convenerit; sic et locatio et conductio contrahi intelligitur, si de mercede convenerit. D. 19, 2, 2, pr.; Inst. 3, 24, pr. See Hunter, Roman Law (2nd ed.), 505-514.

¹ *Pretium autem constitui oportet nam nulla emptio sine pretio esse potest:* Inst. 3, 24, 1. Cp. Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 1, 8, 9. If either party was left to fix a price at his discretion, the contract was void: D. 18, 1, 35, § 1; although *huiusmodi emptio, quanti tu cum emisti quantum pretii in arca habeo, valet:* D. 18, 1, 7, § 1. As to hire, Pothier, *Traité du Contrat de Louage*, n. 37.

² Alluding to a sentence from Paulus, *Locatio et conductio cum naturalis sit, et omnium gentium non verbis sed consensu contrahitur; sicut emptio et venditio:* D. 19, 2, 1. The definition in Maynz, *Éléments de Droit Romain* (2nd ed.), vol. ii. 197, is: *Il y a contrat de louage quand une partie s'oblige à procurer à l'autre l'usage d'une chose, ou à faire quelque chose pour elle, moyennant un prix à payer par cette dernière.* Maynz specifies three essentials to the contract—(1) *L'usage d'une chose ou de services déterminés à mettre à la disposition du conductor, moyennant un prix déterminé;* (2) *Le prix doit être sérieux et certain et consister en une somme d'argent déterminée;* (3) *Dès qu'il y a consentement sur le prix et la chose, le contrat est parfait; aucune formalité n'est requise.*

³ Mommsen, 432, cited from Hare, *Contracts*, 90. Where the hire of a farm was a proportion of the produce the tenant was called *colonus partiarius*. See Pliny, *Epist.* ix. 37. D. 19, 2, 25, § 6, *partiarius colonus, quasi societatis jure, et damnum et lucrum cum domino fundi partitur.*

⁴ Hare, *Contracts*, 91. Cp. Jones, *Bailments*, 118, where, by his definition, he confines letting to hire to cases where pecuniary compensation is given; 86, where he speaks of the contract being for a "stipend or price of the hiring"; and 93, where he classes all other cases as innominate contracts.

⁵ Story, *Bailm.* § 369. Jones, *Bailm.* 90, n. (r), the conclusion of which runs: "So, in Horace,

Tu secunda marmora

Locas,

which the stone-bewer or mason *conducit*." See the explanation of this in Poste's *Gaius* (3rd ed.), 398, that delivery and re-delivery is the fact exclusively regarded in the Latin language; and the bailor is denoted by *locator*, and the bailee by *conductor*, without regarding the incident that while in *locatio-conductio rei* or *operarum*, the *locator* supplies a service for which the *conductor* pays the price, in *locatio-conductio operis faciendi*, it is the *locator* who pays the price and the *conductor* who performs the service.

⁶ 2 Comm. 585; 1 Bell, *Comm.* (7th ed.), 274.

Story's
definition.

Story¹ defines it, "a bailment of a personal chattel, where a compensation is to be given for the use of the thing, or for labour or services about it; or, in other words, it is a loan for hire or a hiring or letting of goods or of labour and services, for a reward."

Division of
the subject.

We have already seen² that this contract is susceptible of a double division—(1) into *locatio* or *locatio conductio rei*, the bailment or letting of a thing to be used by the bailee for a compensation to be paid to him; and (2), *locatio operis*, or the hire of the labour and services of the bailee for a compensation to be paid to the bailor.³ This latter in its turn is susceptible of a subdivision into, first, *locatio operis faciendi*, or the hire of labour and work to be done, or care and attention to be bestowed on the goods bailed by the bailee for a compensation; and, secondly, *locatio operis mercium vehendarum*, or the hire of the carriage of goods from one place to another for a compensation.

An important distinction must be attended to, namely, that while one who hires the services of another is bound to see to the way in which they are performed, and will be answerable for injuries resulting from his negligence, this responsibility is not incurred where there is a contract for the performance of work; because the contractor is not under the control or supervision of the person for whom the work is done.⁴

Requisites of
the contract
locatio con-
ductio.

Story⁵ lays down the requisites to this contract of *locatio conductio*, letting and hiring to be—(1) that the bailment should not be prohibited by law; (2) that it should be between persons competent to contract; and (3) that there should be a free and voluntary consent between the parties. The more detailed consideration of these points does not belong to our subject, but must be referred to the general law of contracts.

1. Hire of Things.

First sub-
division of
hire.
Obligation on
the letter.

The first subdivision of *locatio conductio* is *locatio rei*, or the hiring of a thing, and this we have now to consider.

The obligation on the letter in this case, according to the Roman law, was to allow the hirer, unless prevented by *casus fortuitus*, the full use and enjoyment of the thing hired,⁶ which must be let

¹ Bailm. § 368.

² Ante, 891.

³ Code Civil, arts. 1709, 1710: *Le Louage des choses est un contrat par lequel l'une des parties s'oblige à faire jouir l'autre d'une chose pendant un certain temps, et moyennant un certain prix que celle-ci s'oblige de lui payer. Le Louage d'ouvrage est un contrat par lequel l'une des parties s'engage à faire quelque chose pour l'autre moyennant un prix convenu entre elles.*

⁴ Ante, 718 et seq.

⁵ Bailm. § 378.

⁶ D. 19, 2, 9, §§ 3-4.

in such a condition that it can be used for the purpose agreed on,¹ and to fulfil all his own engagements and trusts in respect to it, according to the original intention of the parties: *Præstare, frui licere, uti licere.*"²

The hirer is answerable for *exacta diligentia* in the case of the *res locata*.³ He must besides pay the *merces*;⁴ and at the end of the term of hiring he must deliver up the *res locata* in as good a condition as when it came into his hands, allowance being made for ordinary wear and tear. The hirer gains a special property in the thing hired, and the letter to hire an absolute property in the price, while he retains a general property as owner in the thing hired.⁵

Obligation on the hirer.

Story,⁶ following Pothier, reduces the main obligations arising from this contract to six heads:

Pothier's classification of obligations arising out of the hire of a thing adopted by Story.

1. The letter must procure delivery of the thing bailed to be made to the hirer, unless otherwise agreed.

2 The letter must refrain from every obstruction in the use of the thing bailed.

3. The letter must not do anything which tends to deprive the hirer of the thing bailed.

4. The letter enters into an implied warranty of title and the right of possession to the hirer. *Ut præstet conductori frui licere, uti licere.*⁷

5. The letter is to keep the thing in suitable order and repair for the purposes of the bailment.

6. The letter warrants the article against faults and defects which prevent the due enjoyment or use of the thing.

As to this last obligation, Pothier⁸ is of opinion that where a person, who lets a thing, knows of a defect that makes it unfit for the purpose for which it is let, he is responsible in damages; and even if he does not actually know it, if the circumstances are such that he ought to have had a suspicion of it and been put on

Pothier's opinion as to the obligation on letting defective things.

¹ D. 19, 2, 19, § 1: *Si quis dolia vitiosa ignarus locaverit, deinde vinum effuxerit tenebitur in id quod interest; nec ignorantia ejus erit excusata.* D. 19, 2, 19, § 7, is on a very curious point and is worth referring to.

² Story, Bailm. § 383. Burthens imposed by law on the *res locata* must be borne by the *locator*, who must execute all repairs, D. 19, 2, 15, § 1; D. 19, 2, 19, § 2; D. 19, 2, 25, § 2, and compensate the *conductor* for all necessary expenditure incurred by him, D. 19, 2, 19, § 4; D. 19, 2, 55, § 1.

³ Cod. 4, 65, 28. *In judicio tam locati quam conducti dolum et custodiam, non etiam casum, cui resisti non potest, venire constat.*

⁴ D. 19, 2, 15, § 7, subject to abatement in the case of any serious impairment of the thing hired. Moyle, Just. Inst. 3, 24, 5.

⁵ Pothier, *Traité du Contrat de Louage*, n. 77, 106, 107, 130, 131.

⁶ Story, Bailm. §§ 383-390. Pothier, *Traité du Contrat de Louage*, n. 53 *et seqq.* See also Maynz, *Éléments de Droit Romain* (2nd ed.), vol. ii. 200.

⁷ Cp. Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 12.

⁸ *Traité du Contrat de Louage*, n. 118, 119, 120; Maynz, *Éléments de Droit Romain* (2nd ed.), vol. ii. 201.

inquiry, and either does not himself inquire or give the hirer the option of inquiry, he is liable. If the letter follows a trade which makes it his duty to know whether the thing has faults or not, he is liable without proof that he did know; for example, a cooper who supplies wine casks made of bad wood, so that they leak, will not be permitted to set up that he did not know the bad quality of the wood; for his profession bound him to know, and to supply none unless of good quality.¹

Hyman v.
Nye.

The English law is the same, and was thus declared in the case of *Hyman v. Nye*.² The defendant was a jobmaster, from whom the plaintiff hired a landau and horses. While he was out with them a bolt in the under part of the carriage broke, and he was thrown out and injured. He brought an action against the defendant. It was proved that the defect, if any, could not have been discovered by ordinary inspection; and whether there was any inspection was not proved. At the trial the judge directed the jury that the plaintiff was bound to prove that the injury he had sustained was caused by the negligence of the defendant, and that if, in their opinion, the defendant took all reasonable care to provide a fit and proper carriage, their verdict ought to be for him. A verdict was given for the defendant, the jury finding that "the carriage was reasonably fit for the purpose for which it was hired, and that the defect in the bolt could not have been discovered by the defendant by ordinary care and attention." A rule was obtained by the plaintiff on the ground of misdirection, and in the result was made absolute. "A careful study of these authorities," said Lindley, J.,³ after passing the cases under review, "leads me to the conclusion that the learned judge at the trial put the duty of the defendant too low. A person who lets out carriages is not, in my opinion, responsible for all defects, discoverable or not; he is not an insurer against all defects; nor is he bound to take more care than coach proprietors or railway companies who provide carriages for the public to travel in; but

Judgment of
Lindley, J.

¹ This passage is cited by Blackburn, J., *Searle v. Laverick*, L. R. 9 Q. B. 122, at 128. Cp. Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14.

² 6 Q. B. D. 685; *Lyon v. Lamb*, 16 Shaw 1188. See *Jones v. Page*, 15 L. T. (N. S.) 619; *Marnier v. Banks*, 17 L. T. (N. S.) 147. In *Willoughby v. Horridge*, 12 C. B. 742, at 748, Maule, J., says: "Suppose it was the duty of one to provide another with a chair; I apprehend that duty could not be said to be fitly and adequately performed, by providing him with a chair having a tenpenny nail driven up through the bottom of it." If the proprietor of recreation grounds licenses roundabouts, shooting galleries, &c., on his grounds, and an accident happens, a different principle seems to be involved. All that is authorized can be done without risk, and the proprietor is warranted in assuming it will be so done. If injury arises from the negligence of the licensee, the proprietor will not be liable. See per Lord Westbury, *Daniel v. Metropolitan Railway Company*, L. R. 5 H. L. 45, at 61. It is not the act that is authorized that causes the injury, but an independent and non-essential default. If the proprietor of the land hires them and lets them out himself, the law is otherwise.

³ Q. B. D. at 687.

in my opinion he is bound to take as much care as they; and, although not an insurer against all defects, he is an insurer against all defects which care and skill can guard against. His duty appears to me to be to supply a carriage as fit for the purpose for which it is hired as care and skill can render it; and if whilst the carriage is being properly used for such purpose it breaks down, it becomes incumbent on the person who has let it out to shew that the break-down was in the proper sense of the word an accident, not preventable by any care or skill. If he can prove this, as the defendant did in *Christie v. Griggs*,¹ and as the railway company did in *Readhead v. Midland Railway Company*,² he will not be liable; but no proof short of this will exonerate him."

Speaking of the foregoing six headings,³ Story says: "In some respects the common law certainly differs, and in others it probably agrees." "The Roman law and the foreign law," he continues, "treats leases of real estate as bailments on hire, and indeed emphatically as such bailments; and the owner or lessor, and not the tenant, is, in the absence of all other stipulations or customs to the contrary, bound to keep the estate in repair. The common law is different in such cases; for the landlord, without an express agreement, is not bound to repair; and the tenant may, and ought to, make the necessary repairs at his own expense.⁴ Lord Mansfield⁵ on one occasion said that by the common law he who has the use of a thing ought to repair it. It is true, that the remark was applied to the case of the grant of a way which was out of repair; but the remark was general. Lord Hale is also reported to have said, that if plate is let, and it is worn out in the service, the hirer is not liable to any action unless he has been guilty of some default.⁶ It has also been decided that tenants are bound to repair fences during their occupancy.⁷ In the absence of any direct authority upon the other points above stated from the foreign law, they must be propounded as still open to controversy in our law." They must therefore be considered with reference to general principles.¹⁰

Story's opinion on the relation between the civil law and the common law with regard to this subject.

¹ 2 Camp. 79.

² L. R. 2 Q. B. 412; L. R. 4 Q. B. 379. As to latent defect in a ship's steering gear, *The Merchant Prince* (1892), P. 9.

³ *Ante*, 953.

⁴ Bailm. § 392.

⁵ Jones, Bailm. 90.

⁶ *Pomfret v. Ricroft*, 1 Wms. Saund. 321, 1 Wms. Notes to Saunders, 557; Countess of Shrewsbury's case, 5 Co. Rep. 13 b, at 14 a; *Ferguson v. —*, 2 Esp. (N. P.) 590; *Horsefall v. Mather*, Holt (N. P.) 7.

⁷ *Taylor v. Whitehead*, 2 Doug. 745, at 749.

⁸ *Pomfret v. Ricroft*, 1 Wms. Saund. 321; 1 Wms. Notes to Saunders, 557, at 574.

n. 7.

⁹ *Cheetham v. Hampson*, 4 T. R. 318.

¹⁰ 2 Parsons, Law of Contracts (6th ed.), 127, says, referring to the cases cited:

Holt, C.J.,
in *Coggs v.*
Bernard.

Holt, C.J., in *Coggs v. Bernard*,¹ after citing the civil law as embodied in Bracton² as his authority, concludes: "From whence it appears that, if goods are let out for a reward, the hirer is bound to the utmost diligence,³ such as the most diligent father of a family uses, and if he uses that, he shall be discharged." The material part of his citation is—*Talis ab eo desideratur custodia, qualem diligentissimus paterfamilias suis rebus adhibet quam si præstiterit et rem aliquid casuamiserit, ad rem restituendam non tenebitur*.⁴

Sir William
Jones on the
meaning of
diligentissimus.

Sir William Jones, however, shews,⁵ "by tracing the doctrine up to its real source, that the *dictum* of the Chief Justice was entirely grounded on a grammatical mistake in the translation of a single Latin word," and that "an epithet which ought to have been translated 'ordinarily diligent,' has been supposed to mean extremely careful."⁶

Dean v.
Keate.

Subsequently, in *Dean v. Keate*⁷—which was an action for the improper treatment of a horse let to hire, where the defendant, in place of sending it to a veterinary surgeon, treated it himself, with the result that he died—Lord Ellenborough said: "Had he [the defendant] called in a farrier he would not have been answerable for the medicines the latter might have administered; but when he prescribes himself, he assumes a new degree of responsibility; and prescribing so improperly, I think he did not exercise that degree of care which might be expected from a prudent man towards his own horse; and was in consequence guilty of a breach of the implied undertaking he entered into when he hired the horse from the plaintiff."⁸ To the same effect is Pothier. He holds that the hirer is only bound for ordinary diligence, and is liable only for ordinary negligence (*faute légère*).⁹

"Perhaps the conflicting opinions may be reconciled, by regarding it as the true principle, that the owner is not bound (unless by special agreement, express or implied by the particular circumstances) to make such repairs as are made necessary by the natural wear and tear of the thing, or by such accidents as are to be expected, as the casting of a horseshoe after it has been worn a usual time; but he is bound to provide that the thing be in good condition to last during the time for which it is hired, if that can be done by reasonable care, and afterwards is liable only for such repairs as are made necessary by unexpected causes."

¹ *Id.* Raym. 909; 1 Sm. L. C. (9th ed.), 201, at 213.

² Bracton, fol. 62 b; cp. Inst. 3, 26, 5.

³ Comm. Vinn. in Just. Inst. 3, 25, 5, n. 2, 3. *In iudicio tam locati quam conducti, dolum et custodiam, non etiam casum cui resisti non potest, venire constat*: Cod. 4, 65, 28. *Culpa autem abest si omnia facta sunt, quæ diligentissimus quisque observaturus fuisset*: D. 19, 2, 25, § 7.

⁴ Inst. 3, 26, 5.

⁵ Bailm. 86.

⁶ Bailm. 87. See note to Story, Bailm. § 398, n. 8 (8th ed.), collecting the authorities; 2 Kent, Comm. 587.

⁷ 3 Camp. 4; Cp. *Eastman v. Sanborn*, 85 Mass. 594.

⁸ See note by Campbell to *Dean v. Keate*, 3 Camp. 4, at 5. See, too, note to *Coggs v. Bernard*, 1 Sm. L. C. (9th ed.), 201, at 228.

⁹ Pothier. *Traité du Contrat de Louage*, n. 190, 192, 429. Cp. *Tilling v. Bailmain*, 8 Times L. R. 517.

The rule as to diligence being, then, settled in the sense contended for by Sir William Jones, the hirer ought to use the thing and to take the same care in the preservation of it which a good and prudent father of a family would take of his own; in other words, he is liable for ordinary negligence. If, then, he hire a horse, he is bound to ride it as moderately and to treat it as carefully as any man of common discretion would his own; and the law implies that proper treatment includes feeding a horse.¹ If, in spite of this care and treatment, the horse gets injured, the hirer is not responsible. To the same purport is a *Nisi Prius* ruling, that if a hired horse refuses its food from fatigue, the hirer is bound to abstain from using it, and that if he pursues his journey with the horse, he becomes liable for all injuries occasioned thereby.² But, as we have seen,³ the particular acts of duty vary with the nature of the things on which they are to be bestowed. One who hires a costly and delicate instrument is bound to act differently from the manner in which he would act were his hiring to be of something cheap and coarse and difficult to injure or to destroy. The same consideration applies if any circumstances fix a peculiar value to the article, and thus call for greater care. Still, it is in no case more than ordinary care that the letter is entitled to exact from the hirer, that is, the care that a man of ordinary capacity and caution exercising his faculties would take of the same thing if it were his own and in the same circumstances.⁴

Rules of
diligence
illustrated.

The obligation to take reasonable care of the thing entrusted to a bailee of this class involves in it an obligation to take reasonable care that any building in which it is deposited is in a proper state, so that the thing therein deposited may be reasonably safe in it; thus, in *Searle v. Laverick*,⁵ a shed was blown down by a high wind, and property bailed to the defendant was injured; notwithstanding this, on proof that the defendant had employed a careful and experienced person to build the shed, and had no knowledge of any negligence on his part, it was held that the plaintiff could not recover.

Rule of
diligence
extends to the
condition of
the building
in which the
thing hired
is deposited.

¹ *Handford v. Palmer*, 2 B. & B. 359.

² *Bray v. Mayne, Gow* (N. P.), 1.

³ *Ante*, 894, 903.

⁴ 2 *Parsons, Law of Contracts* (6th ed.), 122, and note, where the rule applicable to the amount of care to be taken of hired slaves is minutely examined and the judgment of Marshall, C.J., in *Swigert v. Graham*, 7 B. Mon. (Ky.) 661, is set out. Sir William Jones, at 67, says that the word "*diligentissimus*" is improperly applied by Gaius, D. 19, 2, 25, § 7, to the case of an undertaking to remove a column from one place to another. On the other hand, it is pointed out that Gaius was referring not to mere blocks of granite or marble, but to columns which would require the utmost attention to avoid injury. See Kent, Comm. 588 n. (a). The text of Gaius is *Qui columnam transportandam conduxit, si ea dum tollitur, aut portatur, aut reponitur, fracta sit, ita ad periculum prestat, si qua ipsius eorumque quorum opera uteretur, culpa acciderit*.

⁵ L. R. 9 Q. B. 122.

Grote v.
Chester and
Holyhead
Railway
Company.

Grote v. Chester and Holyhead Railway Company,¹ should be noticed here, as at first sight suggesting a stricter rule. An action was brought against a railway company for compensation for personal injury received by the plaintiff by the breaking down of a bridge over which he was being conveyed in a passenger train. The defendants objected that they were not liable, unless they were shewn to be guilty of negligence either in constructing or maintaining the bridge. The judge, at the trial, directed the jury that the question was whether the bridge was constructed and maintained with sufficient care and skill, and was of reasonably proper strength with regard to the purposes for which it was made, and that if they should think it was not, and that the accident was attributable to any such deficiency, the plaintiff was entitled to recover. The jury found a verdict for the plaintiff, and the defendants moved on the ground of misdirection, but were unsuccessful. The principle was stated to be: "If a party in the same situation as that in which the defendants employ a person who is fully competent to the work, and the best method is adopted, and the best materials are used, such party is not liable for the accident."² The rule so laid down is very considerably stricter than that in *Searle v. Laverick*.³ It should be observed, however, that the words "best materials" are to be understood with a similar limitation to that imposed by Lindley, J., in *Hyman v. Nye*,⁴ on the words "reasonably fit and proper" when used with reference to the duty of a carriage proprietor in supplying a carriage for hire. "The expression 'reasonably fit and proper,'" says Lindley, J., "is a little ambiguous, and requires explanation. In a case like the present, a carriage to be reasonably fit and proper must be as fit and proper as care and skill can make it for use in a reasonable and proper manner, *i.e.*, as fit and proper as care and skill can make it to carry a reasonable number of people, conducting themselves in a reasonable manner, and going at a reasonable pace on the journey for which the carriage was hired; or (if no journey was specified) along roads, or over ground reasonably fit for carriages. A carriage not fit and proper in this sense would not be reasonably fit and proper, and *vice versa*. The expression 'reasonably fit' denotes something short of absolutely fit, but in a case of this description the difference between the two expressions is not great." So, too, the expression "best materials" does not

Discussed.

Lindley, J.,
in *Hyman v.*
Nye.

¹ 2 Ex. 251.

² Per Pollock, C.B., 2 Ex. 251, at 255.

³ L. R. 9 Q. B. 122.

⁴ 6 Q. B. D. 685, at 688. See *The Merchant Prince* (1892), P. 9, 179, for a case where negligence having been disproved it was held that the defendants were not bound to go further and shew what was the cause of the defect or obstruction that wrought the injury.

signify those absolutely the best, but materials that would be comprehended in the class of best materials when applied to work of the class with reference to which they are to be used. Again, secondly, it must be borne in mind that in the case of *Searle v. Laverick*¹ the bailee was bound only to use that ordinary care in the keeping of the article bailed which is required from an ordinary bailee for hire, while in *Grote v. Chester & Holyhead Railway Company*² the degree of care exacted is that of a carrier of passengers, which is the most exact diligence. There is, therefore, no conflict between the cases, since they are applied to circumstances in which different degrees of care are requisite.

As a general rule, in the contract *locatio rei* the hirer is bound General rule. only to ordinary care and diligence, and is answerable for ordinary neglect; for the bailment of hiring of a thing is for the mutual benefit of letter and hirer. The hirer is bound to use the article with due care and moderation, and not to apply it to any other use, or to detain it for a longer period, than that for which it was hired.³ If he uses the thing hired in a different way or for a longer time than the terms of the hiring allow, he becomes liable for all accidents happening to it while under his control, even though they may arise from inevitable accident. But where a horse was let to a minor to be moderately ridden, and he returned it in a bad condition, the King's Bench held that there was no power to convert what arose out of a contract into a tort for the purpose of avoiding the plea of infancy; so that as the minor was not chargeable on the contract he was not to be made liable in respect of a tort incidental to it.⁴

Where the thing has perished while in the possession of the hirer, whereby a re-delivery of it has become impossible, the hirer or bailee is excused from the performance of his promise to re-deliver, unless the loss has resulted from some fault of his own, or from some risk which he has taken upon himself.Where re-delivery becomes impossible.

¹ L. R. 9 Q. B. 122.

² 2 Ex. 251.

³ Story, Bailm. §§ 397, 398, 413-415; Jones, Bailm. 68, 69, 121.

⁴ *Jennings v. Rundall*, 8 T. R. 335; but cp. *Burnard v. Haggis*, 14 C. B. (N. S.) 45, where a minor was held guilty in trespass, for injuring a horse he had hired. See *Walley v. Holt*, 35 L. T. (N. S.) 631, where the limitations of the decisions are discussed; *Green v. Greenbank*, 2 Marsh. (C. P.) 485; Roll. Abr. Action sur Cas. (D.) pl. 3 (with which cp. *Cross v. Andrews*, 1 Cro. (Eliz.) 622); also the preface to 4 Rev. R.; *Mills v. Graham*, 1 B. & P. (N. R.) 140; and *Liverpool Adelphi Loan Association v. Fairhurst*, 9 Ex. 422, at 427. In 2 Kent, Comm. 240 *et seqq.*, the authorities are well set out. See also Mr. Holmes's note to the 12th ed., 241, n. ¹, Torts connected with Contracts.

⁵ *Taylor v. Caldwell*, 3 B. & S. 826. Cp. *Chicago, Milwaukee and St. Paul Railway Company v. Hoyt*, 149 U. S. (42 Davis) 1. In *Williams v. Lloyd*, Sir Wm. Jones 179, it was said: "When a man agrees to deliver a horse to another and it dies, without default or negligence of the defendant, in this case the bailee shall be discharged," or, as the proposition is most abstractly stated in *Lloyd v. Guibert*, L. R. 1 Q. B. 115, at 121, that by the common law a person who expressly contracts absolutely to do a

Onus of shewing negligence.

The *onus* of shewing negligence is, in some cases, thrown on the letter; so that a hirer is not bound to prove affirmatively that he used reasonable care,¹ though he is bound to account, that is, to give an explanation of the cause of the loss or injury.² It has, however, been held not enough to shew that a horse which was let sound was returned with its knees broken.³

Where thing bailed returned in damaged condition.

The position of the bailor if the bailee returns the article hired in a damaged condition becomes dependent on the character of the damage done. The bailor commits his property to the bailee on the undertaking, most generally an implied undertaking, that he will take due care of it. In ordinary circumstances good faith requires that, if the property is returned in a damaged condition, some account should be given of the time, place, and manner of the occurrence of the injury. If, then, the bailee returns the property in a damaged condition, and fails to give any account of the matter, the law will authorize a presumption of negligence on his part; because, there being no apparent cause for the accident, and the possession being with the bailee, it is for him to give some account of how the matter happened, and not for the bailor to give positive evidence beyond shewing the deteriorated condition of the article;⁴ but if the deterioration is such as, in the ordinary course of things, happens to those who use proper care, the damage will not in itself afford evidence of negligence in the absence of explanation.⁵ There are a hundred probable causes of a horse falling and breaking its knees quite apart from any default in the bailee. If not an ordinary incident of keeping a horse, such an

thing not naturally impossible is not excused from non-performance because he is prevented by the act of God or the king's enemies (*Paradine v. Jane*, Aleyn, 26). With these cases should be considered *Rhodes v. Forwood*, 1 App. Cas. 256, and *Turner v. Goldsmith* (1891), 1 Q. B. 544; the former case was decided on the ground that where there was no express contract to employ an agent in the circumstances there set out, no such contract would be implied; the latter, on the ground that the defendant had given up business and made no attempt to renew it, and that a condition sought to be implied by the defendant that his manufactory, which was burnt down, should continue to exist, was not to be imported into the contract between plaintiff and defendant. With these cases may also be considered, *Appleby v. Myers*, in the Ex. Ch. L. R. 2 C. P. 651; *Robinson v. Davison*, L. R. 6 Ex. 269; *Howell v. Coupland*, L. R. 9 Q. B. 462, 1 Q. B. Div. 258; *Cunningham v. Dunn*, 3 C. P. D. 443. See also, *Couturier v. Hastie*, 5 H. L. C. 673, at 681; *McKenna v. McNamee*, 15 Can. S. C. R. 311; *Pollock, Contracts* (6th ed.), 382-410.

¹ *Harris v. Packwood*, 3 Taunt. 264; *Marsh v. Horne*, 5 B. & C. 322.

² The subject is very fully discussed by Coulter, J., *Logan v. Mathews*, 6 Pa. St. 471, at 418-421, 2 Parsons, *Contracts* (6th ed.), 125.

³ *Cooper v. Barton*, 3 Camp. 5. Cp. *Handford v. Palmer*, 2 B. & B. 359.

⁴ *Logan v. Mathews*, 6 Pa. St. 417; *Story, Bailm.* §§ 411, 414; *Malaney v. Taft*, 6 Am. St. R. 135, the case of a horse hired to be driven to one place and driven to another without bailor's consent; the decision relied on *Cooper v. Barton*, 3 Camp. 5, note; *Skinner v. London, Brighton, and South Coast Railway Company*, 5 Ex. 787; *Byrne v. Roadle*, 2 H. & C. 722; *Scott v. London Docks Company*, 3 H. & C. 596.

⁵ *Kearney v. London and Brighton Railway Company*, L. R. 5 Q. B. 411; L. R. 6 Q. B. 759; *Higgs v. Maynard*, H. & R. 581; *Welfare v. London and Brighton Railway Company*, L. R. 4 Q. B. 693 (Ex. Ch.); *Moffatt v. Bateman*, L. R. 3 C. P. 115.

occurrence is quite consistent with an absence of negligence in keeping it, and therefore in such a case negligence must be shewn and will not be presumed.¹ Again, if a gilded mirror is lent and is returned tarnished, wear and tear will account for this, and in the absence of other circumstances is the reasonable explanation.² In these circumstances the *onus* is on the lender to shew bad usage. If, however, the mirror is returned with a portion of its frame missing or cracked, the *onus* is on the hirer to discharge himself of the negligence which *prima facie* attaches.

The Scotch cases on this point of *onus* are numerous and interesting, and certain of them may with advantage be considered here. The earliest reported dates back to 1679.³ "The Lords found, where a man hires a horse, if it die, or fall sick or crooked by the way (though he can prove that he rode *modo debito*, and not farther than the place agreed upon) yet the rider must prove the *casus fortuitus quem nulla præcessit illius culpa*, nor negligence, and the defect or latent disease it had before he hired it; and if he succumb in proving this, he must pay the price of the horse or the party's damage and interest." The reporter then comments on the decision thus: "The Chancellor's vote cast this decision, viz., that the rider should prove the accident and his own diligence, which is *perquam durum*. This is a difficult probation to burden the rider with, since horses may have latent diseases before the hiring." Scotch cases on *onus*.
Binny v. Veaux.

In 1809 occurred the case of *Robertson v. Ogle*,⁴ where a horse having been hired and returned useless, the Court held the proprietor was not obliged to prove actual maltreatment whilst the horse was out of his possession; but "if the horse's malady arose from any cause for which the defender was not blameable, and which he could not controul, the *onus probandi* lay upon him." *Robertson v. Ogle*.

The matter was a second time brought before the Court, when Lord Cullen said: "The horse had departed sound, and returned much damaged. The pursuer, Robertson, could not prove the treatment the horse had received in the interim when out of his custody; but in a case of this kind, it was customary to follow the rule, that *probatis extremis præsumuntur media*." The Lord Justice-Clerk said that, "upon reconsidering the matter, he believed the rule laid down by Lord Cullen, was the soundest to

¹ See *post*, 966.

² In *Pomfret v. Ricroft*, 1 Wms. Saund. 321, at 323 b, Hale, C.J., is reported as saying: "If I lend a piece of plate and covenant by deed that the party to whom it is lent shall have the use of it, yet if the plate be worn out by ordinary use and wearing without any fault, no action of covenant lies against me."

³ *Binny v. Veaux*, Morison, Dict. Dec. 10079. As to *onus* generally, see *ante*, 127 et seq.

⁴ Decisions of Court of Session, 23rd June 1809.

walk by; although at first he had been inclined, in this case, to give effect to the ordinary maxim, *res perit suo domino*. Had the horse died by an accident, there is no doubt, he must have perished to Robertson." The former judgment was adhered to.

Pyper v.
Thompson.

In *Pyper v. Thompson*,¹ decided in 1843, the hirer was held not liable where he shewed that the accident sued arose from a vice of the animal's: "the origin of the whole was the backing of the horse, which was the horse's fault and not the defender's." Lord Justice-Clerk Hope states the law thus:² "I acknowledge as sound and just the rule, that if a person gets a horse, or indeed any article belonging to another, for use, on the contract of hire, and brings back that animal or article much injured, he in whose custody and charge it was, must be able to discharge himself of the care he was bound to bestow on the property of the other, by showing that he was not to blame in regard to the cause of the injury, and must in general case be able to show how the accident occurred."

Wilson v. Orr.

In *Wilson v. Orr*,³ it was established that the horse, whose loss was the subject of action, had died from the effects of a blow on the shoulder, which there was evidence to shew had been given whilst he was in the defender's custody. How or when given there was no evidence to shew. The Court held that it lay upon the defender to shew the cause of injury, and at least to produce *prima facie* evidence that the cause was one for which he was not responsible; and having failed in this he was liable for the value of the horse. Lord Gifford's dictum in this case is noteworthy:⁴ "Unless some blame attaches somewhere, the general rule is *res perit domino*," and is a good working solution of the various difficulties that may arise.

Bain v. Strang.

The last of these Scotch cases,⁵ *Bain v. Strang*, illustrates the general rule *res perit domino*. A man borrowed a horse which, whilst doing its work, without any apparent reason stumbled and was injured. The Court "assoilzied defender" on the ground that though the *onus* was on him to prove that he had exercised reasonable care in the use of the thing bailed, in this case he had discharged it. Lord Shand states the rule thus:⁶ "where a horse, hired or lent, is taken out sound and brought back damaged, there is an *onus* on the borrower to shew that the injury was not caused through his fault, and that it was sustained notwithstanding all reasonable care on his part." "If," said Lord President Inglis,⁷ "the article is returned in a damaged

¹ 5 Dunlop, 498.

² (1879) 7 Rettie, 266.

³ (1888), 16 Rettie, 186. Cp. Exodus xx. 10, 11.

⁷ 16 Rettie, at 189.

² 5 Dunlop, at 499.

⁴ 7 Rettie, at 268.

⁶ 16 Rettie, at 191.

condition there is an *onus* on the borrower to show that the damage did not arise through his fault. It is argued that the *onus* is heavier than that, and that he is bound to shew what was the specific cause from which the injury arose. I am not disposed to decide that question. . . . We have, I think, sufficient evidence to show that reasonable care was used."

The general rule, then, may be stated in the words above quoted from Lord Gifford. The circumstances, however, may be almost infinite.

General rule
res perit domino
where no
blame attaches.

Story¹ is of opinion that a misuser of property entrusted to a bailee is at common law a conversion of the property. As we have seen in considering the subject of pawns, in English law this is not necessarily so.² A distinction must be drawn between those acts which are altogether repugnant to the bailment and those acts which, though unauthorized, are not so repugnant as, by their mere existence, to operate as a disclaimer and a determination of the holding.³

Is misuser
equivalent to
conversion?

To this head of *locatio rei* must be referred that class of cases where a carriage and horses are hired, and the letter sends with them his coachman or servant;⁴ and also the whole class of cases where the responsibility of a master for the use by his servants of the thing hired comes in question.⁵ The greater leniency of the Roman law than of our own should be noted. Sir William Jones⁶ gives the opinion of Pomponius,⁷ which was

Hire of ready
furnished
lodgings.

¹ Bailm. § 413. See *Cooper v. Willomatt*, 1 C. B. 672; *Loeschman v. Machin*, 2 Stark. (N. P.) 311; *Farrant v. Thompson*, 5 B. & Ald. 826.

² *Ante*, 944.

³ *Donald v. Suckling*, L. R. 1 Q. B. 585, at 615; *Bac. Abr. Bailment* (C); *id. Trover*, (C), (D), (E); *Isaack v. Clark*, 2 Bulst. 306, at 309; 2 Wms. Notes to Saunders 91 n. (b), at 92.

⁴ *Ante*, 722.

⁵ *Ante*, 697 *et seqq.* *M'Manus v. Crickett*, 1 East, 106; *Croft v. Alison*, 4 B. & Ald. 590; *Limpus v. London General Omnibus Company*, 1 H. & C. 526, and the rest. Wharton cites a case (*Negligence* (2nd ed.) § 716) from Mommsen, of a student hiring a horse from a livery stable keeper, which, when he arrived at his destination, he gave to the ostler, who fastened the horse so negligently in its stall as to suffocate it. Mommsen is of opinion that the student could not be reasonably expected to know about the fastening of a horse, and that he is liable for ignorance only of what he could be reasonably expected to know. Wharton, however, is of the opposite opinion: "First, if I hire a horse, I must see that he is safely kept as well as safely driven, and if I take the horse under my care, the owner of the horse has as much right to presume that I know how to tie him as that I know how to drive him." "Secondly, even supposing the first point to fail, the maxim *Respondet superior* here comes in." I am unable to agree with either of these reasonings. In the first place, the duty is not to tie the horse up personally, but to take proper care to hand him to a proper person; secondly, the delivery of a horse to an ostler at an inn does not seem to me to constitute any relationship of master and servant. On the other hand, in America, *Hall v. Warner*, 60 Barb. (N. Y.) 198, would be an authority. The law in Scotland is clear that "a person who hires a horse is not responsible for the *culpa* of those (ostlers of inns and others) to whom in the course of a journey he properly entrusts it." *Smith v. Melvin*, 8 Dunlop, 264. The point might have been raised in *Coupé Company v. Maddick* (1891), 2 Q. B. 413. The judges, however, do not even allude to it.

⁶ Bailm. 89.

⁷ D. 19, 2, 11.

generally adopted, and which makes the master liable only when he is culpably negligent in admitting careless guests, or servants whose bad qualities he ought to know, whereas in English law the master is liable for all acts, unless wilfully done for the servant's own benefit or "without the scope" of the hiring.

Hire of horse
and carriage
with servant.

To illustrate the rule of the English law, Sir William Jones¹ gives the example of the hire of ready-furnished lodgings, where, if the hirer's servants, children, guests, or boarders, negligently injure or deface the furniture, the hirer is responsible.

Coupé Com-
pany v.
Maddick.

The Coupé Company v. Maddick² may be noted in this connection. The plaintiffs brought an action in the County Court to recover damages from the defendant for injuries to a carriage and horse hired from them by the defendant. The injuries were caused by the man employed by the defendant to drive the carriage, who, after having driven his master home, in breach of orders started on an entirely new and independent journey, which had nothing to do with his employment; in the course of which the horse and carriage were injured. The County Court judge held that the hirer was not responsible, on the authority of Storey v. Ashton.³ This involved a finding by the judge sitting as a jury, that the hirer was in every respect free from negligence; and that the man's act was wholly outside his authority as servant.

Judgment of
the Divisional
Court.

The County Court judge's decision was set aside by the Divisional Court⁴ on two grounds: first, that the owner could maintain no action against the servant for breach of duty in the wrongful and negligent use of the horse and carriage by which they were damaged; "because . . . there was no invasion by the servant of the latter's (the owner's) right of ownership, and no contractual relation between them"; and, secondly, "on general principles of the public benefit." The decision seems to be sustainable on neither of these grounds. As to the former, Mears v. The London and South-Western Railway Company⁵ is in point on the other side. As to the latter, Lord Field's review of the cases in Bank of England v. Vagliano⁶ on the principle determining which of two

¹ Bailm. 89, citing Pothier, *Traité du Contrat du Louage*, n. 193. Cp. Code Civil, art. 1735.

² (1891) 2 Q. B. 413.

³ L. R. 4 Q. B. 476.

⁴ Cave and Charles, JJ.

⁵ 11 C. B. N. S. 850. In *Lotan v. Cross*, 2 Camp. 464, Lord Ellenborough held that a mere gratuitous permission to a third person to use a chattel, does not in contemplation of law take it out of the possession of the owner, who may maintain trespass for any injury done to it while so used. See this case criticised, Holmes, *The Common Law*, 173. As to what "permanent injury" is, see *Mumford v. Oxford, Worcester, and Wolverhampton Railway Company*, 1 H. & N. 34. On the general matter, Roll. Abr. Action sur Case, O; and Bullen and Leake, *Prec. of Plead.* (3rd ed.), 395.

⁶ (1891) App. Cas. 107, at 169. As to "public policy," see per Parke, B., advising the House of Lords in *Egerton v. Brownlow*, 4 H. L. C. at 123; also Pollock, *Contracts* (6th ed.), 297, and *ante*, 874 n. 1.

innocent parties is to suffer where loss arises from the misconduct of a third person, negatives the proposition enunciated by the learned judges in the Divisional Court.¹

The difficulty in the case seems to turn on a difference between the common conception of the contract entered into and the legal aspect of the contract. Had the question of what the particular contract was been submitted to a jury, it would have been open to them to cut the knot by finding that the hirer had undertaken to take care to prevent such acts as occasioned the injury.² The finding of the judge, that the hirer was guilty of no want of care, excludes this particular solution; and the question submitted to the Court was what is the presumption of law in a case where there is no finding of a contract to be answerable specially. As to this the authorities³ all point in one direction, and the conclusion from them is in direct conflict with the learned judges' decision. If the hirer rebuts the presumption of fault and shews that the injury happened in some way with regard to which he is free from blame, he is free also from liability.

The case of a user that is wrongful, and a loss following, but not necessarily through the wrongful user, has been put; and answered by Tindal, C.J.,⁴ as follows: "The real answer to the

Criticised.

Loss following wrongful user but not necessarily consequent on it.

¹ The case has been lengthily considered in *The Law Magazine* (4th ser.), vol. xvii. 97-118.

² But cp. *Searle v. Laverick*, L. R. 9 Q. B. 122, where the question differed by being in what building the carriage was to be kept, and where Blackburn, J., said (131): "We think that we must take notice of the fact that in the general and more ordinary state of things, a warehouseman or livery-stable keeper is tenant of the buildings in which he lodges the goods intrusted to him; and we know that in the ordinary case of lessor and lessee there is no implied covenant on the part of the landlord to his tenant that the building shall be fit for the purposes for which it is let." For this he cites *Hart v. Windsor*, 12 M. & W. 68.

³ *Story*, *Bailm.* § 402, *On Agency*, §§ 452-457; *Coleman v. Riches*, 16 C. B. 104. Cp. also 35 & 36 Vict. c. 93, s. 8; *Armfield v. Mercer*, 2 Times L. R. 764. The rule of the Roman law is thus stated: *Culpam etiam eorum quos induxit, præstat suo nomine, etsi nihil convenit; si tamen culpam in inducendis admittit, quod tales habuerit, vel suos vel hospites*, D. 19, 2, 11. Article 1732 of the Code Civil is: *Il répond des dégradations ou des pertes qui arrivent pendant sa jouissance, à moins qu'il ne prouve qu'elles ont eu lieu sans sa faute*. Pothier, *Traité du Contrat de Louage*, n. 199, says: *Le locataire est déchargé de l'obligation de rendre la chose, si la chose a péri sans sa faute; mais il doit enseigner et justifier comment elle a péri, autrement elle est présumée avoir péri par sa faute, et il est tenu de l'estimation*. Compare also the case stated by Mommsen, *ante*, 963. The Dutch law provides that the hirer "is bound to make good all losses or damages, which by his own delicts, or by the neglect of his household, or even by any others out of hatred to the lessee, have been occasioned to the property hired. And the ignorance of any art that the party undertakes, or a trifling imprudence in matters which can only be carried on with the greatest prudence, is considered as a neglect; as also fire, unless the lessee proves it to be the effect of inevitable accident; in which case, the same as in all other misfortunes, he is not liable to make compensation to the lessor, except when a person stipulated a sum for the safe-keeping," Grotius, *Introduction to Dutch Jurisprudence* (Eng. Trans. by Herbert), bk. iii. c. 19, *Of Letting and Hiring*, sec. 11.

⁴ *Davis v. Garrett*, 6 Bing. 716, at 724. In *Adams v. Royal Mail Steam Packet Company*, 5 C. B. (N. S.) 492, there was twofold delay. First, the charterers had no cargo at the place of loading when the ship was ready to receive it; secondly, after the

objection is that no wrongdoer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done. It might admit of a different construction if he could shew, not only that the same loss *might* have happened, but that it *must* have happened if the act complained of had not been done."

Sir William
Jones's view.

Sir William Jones's view¹ is, "If the bailee, to use the Roman expression, be *in mora*, that is, if a *legal demand* have been made by the bailor, he must answer for any casualty that happens *after the demand*; unless in cases where it may be strongly presumed that the same accident would have befallen the thing bailed even if it had been restored at the proper time; or, unless the bailee have legally tendered the thing, and the bailor have put himself *in mora* by refusing to accept it; this rule extends, of course, to every species of bailment." This is not exactly in point, since stress is laid upon a *legal demand*, and by the necessity of the case under discussion no legal demand can be made. The reasonable rule seems to be that the responsibility arises if the act is such as to warrant the plaintiff making a legal demand. If this be so, the case may be referred to the distinction between acts which determine the bailment and acts that only sound in damage. The practical effect is very similar; since, if legal demand be presumed, the hirer is responsible for any casualty happening after the demand. If the deviation from the lawful use does not warrant a legal demand, on proof of the loss and of the unlawful dealing with the bailed article, a presumption arises importing similar liability—viz., for the whole value of the thing lost or injured—and which is only to be rebutted by shewing the same accident would have happened irrespective of the negligent and wrongful user. Sir William Jones's language, on the strength of the presumption that the accident would have in any case happened, does not seem adequate. He who, having undertaken a bailment, loses the article bailed in circumstances importing negligence, cannot escape liability on any presumption that if the negligence had not occurred the loss would still have occurred. He is put to shew that whether he was or was not negligent in all human prob-

Discussed.

cargo arrived there was a further delay in loading, owing to a strike among the colliers. The Court held the charterers liable for the delay, and no distinction was made between the first period and the second. But for the first delay the second might have been immaterial: see per Williams and Byles, JJ., at 494

¹ Bailm. 70, 71.

ability the same result would have befallen, before he can be excused.¹

In *Davey v. Chamberlain*² a somewhat peculiar question arose. The action was for negligently driving a chaise, whereby the plaintiff's horse was killed. The two defendants were proved to have been together in the chaise when the accident happened; Chamberlain was sitting in the chaise smoking while the other was driving. For Chamberlain it was contended that he was not liable, as the injury proceeded from the ignorance or unskilfulness of the other defendant, who was driving, and in charge of the horse and chaise. Lord Ellenborough's direction was: "If a person, driving his own carriage, took another person into it as a passenger, such person could not be subjected to an action in case of any misconduct in the driving by the proprietor of the carriage, as he had no care nor concern with the carriage; but if two persons were jointly concerned in the carriage, as if both had hired it together, he thought the care of the King's subjects required that both should be answerable for any accident arising from the misconduct of either in the driving of the carriage, while it was in their joint care."

Cab Cases.—The relation of cabman and cab proprietor is somewhat anomalous, partaking of some of the incidents of bailment of a thing, *locatio rei*, and also of some more proper to the relation of master and servant.

In London the rights and liabilities of cab proprietor and cabman are fixed by the Metropolitan Hackney Carriage Acts,³ as interpreted by a series of cases. The first case to be noted is *Morley v. Dunscombe*,⁴ where the Court of Queen's Bench held that the arrangement between proprietor and man, that the proprietor should receive a certain sum and that the man should keep the excess of his receipts over it, constituted "clearly an arrangement between the defendant and the man as to the mode in which the wages of the latter should be paid." The same question was raised in *Powles v. Hider*.⁵ Plaintiff, while travelling in a cab of which the defendant was the proprietor, lost his luggage by the fault of the driver, and sued the defendant on a contract to carry the luggage. Defendant contended that he was not liable,

¹ *Davis v. Garrett*, 6 Bing. 716; *Lilley v. Doubleday*, 7 Q. B. D. 510; Wharton, Negligence (2nd ed.), § 559.

² 4 Esp. (N. P.) 229. Very like this is *Muse v. Stern*, 3 Am. St. R. 77, where defendant, being driven in his partner's phaeton by his partner's servant, was held not liable for an accident by which plaintiff was injured. See a note to 2 Parsons, Contracts (6th ed.), 121.

³ 1 & 2 Will. IV. c. 22; 3 & 4 Will. IV. c. 48; 6 & 7 Vict. c. 86; 16 & 17 Vict. cc. 33, 127; 30 & 31 Vict. c. 134; 32 & 33 Vict. c. 115.

⁴ 11 L. T. (O. S.) 199.

⁵ 6 E. & B. 207.

Davey v. Chamberlain.

Cab cases.

Metropolitan Hackney Carriage Acts. Morley v. Dunscombe.

Powles v. Hider.

because the relation between himself and the cabman was that of bailor and bailee. The Queen's Bench, however, held that, under the Acts of Parliament, the driver was to be considered the servant or agent of the proprietor, and decided in accordance with *Morley v. Dunscombe*.

*Fowler v.
Lock.*

*Fowler v. Lock*¹ differed from *Powles v. Hider* in that the action was by the cabman against the cab proprietor. Plaintiff was a driver upon the same terms as those proved in *Powles v. Hider*, and was hurt in consequence of the horse running away. A verdict was given for the plaintiff, with leave to move reserved to enter a verdict for the defendant or a nonsuit. The Court was divided, and Grove, Byles, JJ., holding the relation between the cabman and the cab-master to be that of bailor and bailee, and the master liable; while Willes, J., considered that the case came within *Powles v. Hider*, and that the relation was that of master and servant. *Powles v. Hider* was distinguished, by the majority of the Court, on the ground that the Metropolitan Hackney Carriage Acts referred only to the relation between carriage proprietors and people generally, and were not to be construed to alter the relations between the cab-master and the cabman. The effect of this view very largely increases the liabilities of the cab-master, and very considerably improves the position of the cabman; for the cab-master, as regards the outside world, is thus liable as for the acts of a servant; while as regards the cabman, he is fixed with the ordinary liabilities arising in the case of a bailor and bailee.

The subsequent history of this case is curious. The decision was appealed from, and the judges in the Exchequer Chamber were divided in their opinions upon it; but as those judges who were of opinion that the cabman was bailee were not satisfied that it followed necessarily that there was a warranty that the horse bailed was fit for the purpose for which it was bailed, and it might be that the plaintiff took upon himself the risk of its fitness, a new trial was ordered. On the new trial the jury found that there was personal negligence on the part of the plaintiff in the selection of the horse; on this the Common Pleas refused a third trial.² Thus the reconsideration of the case was avoided; since if the cab-master and cabman were related as master and servant, then the master was liable for personal negligence;³ while if the relation was that of bailor and bailee, then he was liable on the terms of the bailment.

¹ (1872) L. R. 7 C. P. 272, L. R. 9 C. P. 751 n. Mention is made of these cases in *Smith v. Bailey* (1891), 2 Q. B. 403 at 405.

² L. R. 10 C. P. 90.

³ *Ante*, 742.

In *Venables v. Smith*¹ the action was by an outside person against the cab proprietor. Plaintiff was run over by a cabman after the day's work was over, and when executing some private business of his own. Plaintiff sued the cab proprietor. The Court followed the decision in *Powles v. Hider*. Cockburn, C.J., said: "Independently of the Acts of Parliament relating to this subject, the relation between them—i.e., the driver and the proprietor—would be that of bailor and bailee, not that of master and servant." "But I think that the provisions of the Acts of Parliament alter what would otherwise be the relation of the proprietor and the driver, and for the purpose of the public produce the result that, as regards mischief done by the driver, who is selected by the proprietor, the relation of master and servant so far exists as to render the proprietor responsible for the acts of the driver."²

A limitation on *Powles v. Hider* and *Venables v. Smith* was suggested in *King v. Spurr*.³ It was there sought to make a cab proprietor liable who lent out a cab for a certain stipulated sum, the driver supplying the horse and harness. Grove and Bowen, JJ., distinguished the case from those cases where both carriage and horse were lent. In many cases, it was said, the effect of the statutes is to create the relation of master and servant—indeed, sufficient to raise the presumption that that is the relation in all, but not to create the relation in all; and a case where the horse and harness are not supplied by the cab proprietor does not come within the Act.

In *King v. London Improved Cab Company*,⁴ however, Lord Esher, M.R., said: "I have come to the conclusion that by virtue of the Act the public are entitled, whether as between the proprietor and the driver the relationship of master and servant exists or not, to say that so far as the public are concerned that relationship must be deemed to exist." Lindley, L.J., suggested a distinction saving *King v. Spurr*: "I will only add that the regulations as to what has to be registered and accessible to the public seem to be based on the supposition that where a proprietor allows persons to drive his cabs in the public streets, such persons, so far as the public are concerned, are to be deemed

¹ (1877) 2 Q. B. D. 279; *Phayle v. Kew*, 2 Times L. R. 849. *Venables v. Smith* was approved by the Court of Appeal in *King v. London Improved Cab Company, Limited*, 23 Q. B. Div. 281.

² *Steel v. Lester*, 3 C. P. D. 121, was the case of a ship navigated under a verbal agreement, where it was held that the agreement did not amount to a demise of the vessel, and that whatever was the precise relationship between the master and the owners, both were liable for negligence of the master in the management. The cab cases were much considered in the case.

³ (1881) 8 Q. B. D. 104.

⁴ 23 Q. B. Div. 281.

servants of the proprietor. All the cases, except *King v. Spurr*,¹ are consistent with this view, and that case may be distinguishable, though the distinction may not be a very broad one, for there the cab only was hired by the driver and the horse was his property."

Keen v. Henry. This suggestion was seized upon in *Keen v. Henry*² as distinguishing that case from *King v. London Improved Cab Company*, and identifying it with *King v. Spurr*, the suggested distinction was, however, repudiated by the Court of Appeal. "It is evident," says Kay, L.J.,³ "that the Lord Justice did not think the distinction a sound one;" and Lord Esher, M.R., added: "It must be understood that we are all of opinion that *King v. Spurr* has been overruled."

Summary. The law as to cabs in London may therefore be summarized in two propositions:

1. A cab-master stands to his cab-driver in the relation of master to servant wherever any act is done in the course of the cab-driver's business which causes any injury or liability to the outside world.⁴

2. Between cab-master and cabman the relation is that of bailor and bailee.⁵

2. Hire of Labour and Services.

Locatio operis. We next consider the second class of bailments for hire—*locatio conductio operis*,⁶ or the hiring of labour and services. This, we have already seen, is divided into (i.) *locatio operis faciendi*, (ii.) *locatio operis mercium vehendarum*. First, then, as to *locatio operis faciendi*. This again is divided into two kinds—(A) the hire of labour, or *locatio operis faciendi* strictly so called, (B) *locatio custodiæ*, or the receiving of goods on deposit for a reward for the custody thereof.

The *conductor operis*, in the Roman law, must execute and deliver the *opus* according to the specifications, and he is answer-

¹ 8 Q. B. D. 104.
L. c. at 296.

² (1894) 1 Q. B. 292.

⁴ *Powles v. Hider*, 6 E. & B. 207; *Venables v. Smith*, 2 Q. B. D. 279; *King v. London Improved Cab Company, Limited*, 23 Q. B. Div. 281.

⁵ *Fowler v. Lock*, L. R. 7 C. P. 272, L. R. 9 C. P. 751 n., L. R. 10 C. P. 90. Where a driver had accidentally injured a street lamp in London, his employer is not liable for the damage done under sec. 107 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120): *Harding v. Barker and Sons*, 5 Times L. R. 42. *Baylis v. Lintott*, L. R. 8 C. P. 345, was an action against a hackney carriage proprietor for not securely carrying certain luggage belonging to a person who had hired his cart while plying for hire under the management of defendant's servant.

⁶ *Sohm*, Inst. of Roman Law (Eng. Trans.), 312; *Hunter*, Roman Law (2nd ed.), 511-516. *Locatio conductio operis* was said to be made *per aversionem* if the contract was for the job at a fixed price. *Per aversionem*, c'est-à-dire en bloc pour un seul et même prix. *Pothier*, Traité du Contrat de Vente, n. 308; see also *Pothier*, Traité du Contrat de Louage, n. 435, 436.

able for all defects, whether due to his own want of skill or to that of his workmen.¹ This liability exists till the acceptance and approval of the work by the *locator*.² If the work is destroyed before completion, the *conductor* is entitled to payment so far as he has gone, unless the contract is *per aversionem*.³

The *locator* must pay the *merces* agreed on if the work is satisfactorily executed; but if misled as to the price, he may withdraw from the contract.⁴

(A) Bailees for the hire of labour or services.

(A) Hire of labour or services.

A distinction must here be taken between the present case and those we have before had to consider. In the case of the hire of labour and services the bailor is to pay the hire; whereas in the case of the hire of things the bailee is to pay it.⁵ In the former case the phrase is *Res facienda datur*; in the latter, *Res utenda datur*.⁶

In the Civil law another distinction was taken with regard to the hire of labour or services, between *operæ illiberales*, where a man works in consideration of pay; and *operæ liberales*, which are not the subject of hire, and for which the person requiring the services paid an *honorarium*.⁷

Operæ illiberales and *operæ liberales*.

A difficulty has sometimes arisen in determining whether a contract is for the sale of goods or for work and labour. Lee *v.* Griffin⁸ prescribes the test of whether when the contract is carried out it will result in the sale of a chattel. If so, in English law the action cannot be brought for work and labour. If, on the other hand, work and labour have been done which result in nothing that can be the subject of sale, no action can be brought for goods sold and delivered.⁹

Sale of goods or work and labour.

First, as to the position of the bailor in this relation of *locatio operis faciendi*. Story,¹⁰ following Pothier, sets out the duties on the part of the employer in the Roman law under the following four heads:

Duties of the bailor.

1. To pay the price or compensation.
2. To pay for all proper new and accessorial materials.

¹ D. 19, 2, 25, § 7; D. 19, 2, 13, §§ 5-6.

² D. 19, 2, 24, pr. but *fides bona exigit ut arbitrium tale præstetur quale viro bono convenit*.

³ D. 19, 2, 36, 37, 59.

⁴ D. 19, 2, 60, § 4.

⁵ *Coggs v. Bernard*, 1 Sm. L. C. (9th ed.), 201, at 225. See also next note.

⁶ Pothier, *Traité du Contrat de Louage*, n. 393.

⁷ Maynz, *Eléments de Droit Romain* (2nd ed.), vol. ii. 206.

⁸ 1 B. & S. 272, explaining *Clay v. Yates*, 1 H. & N. 73. See the judgment of Beardsley, J., *Gregory v. Stryker*, 2 Denio (N. Y.), 628. Cp. D. 19, 2, 31.

⁹ The test adopted before the decision in the text was whether work and labour are of the essence of the contract: *Clay v. Yates*, 1 H. & N. 73. Cp. *Atkinson v. Bell*, 8 B. & C. 277.

¹⁰ Bailm. § 425, citing Pothier, *Traité du Contrat de Louage*, n. 405-410, 436, 437; 1 Domat, Bk. 1, tit. 4, § 9. Bell, *Principles of the Law of Scotland* (9th ed.), 102.

3. To do everything on his part to enable the workman to execute his engagement.
4. To accept the thing when it is finished.
To these he subjoins on his own authority:
5. To be honest and observe good faith in his conduct.
6. To disclose defects to the other party.
7. To conform to the special stipulations contained in the contract.

And he winds up: "These duties are formally treated of by Pothier,¹ and they seem so clear upon principles of general justice that the common law could hardly be deemed a rational science if it did not recognize them."

Destruction of
article bailed
pending
completion.

There has been much discussion as to the effect of a destruction of the article bailed pending completion or delivery. The sum of the results arrived at, after much conflicting and philosophical reasoning, may be stated as follows:

If, while the work is in progress, or at any time before the time when it should be delivered to the employer, the thing, which is the property of the employer and upon which the work is being done, perishes by internal defect, by inevitable accident, or by irresistible force, without any default of the workman, the workman is entitled to compensation to the extent of the value of the labour actually performed on it, unless his contract import a different obligation, for the maxim is *Res perit domino*.² If the

¹ *Traité du Contrat de Louage*, 405-417.

² 2 *Parsons* (6th ed.), *Contracts*, 131. See *ante* 959, note ⁴. In the Roman law this maxim applies only to the contracts of *mutuum* and *commodatum*. In *emptio-venditio* the rule is as in English law. *Cum autem emptio et venditio contracta sit . . . periculum rei venditæ statim ad emptorem pertinet, tam etsi adhuc ea res emptori tradita non sit. . . . Quidquid enim sine dolo et culpa venditoris accidit, in eo venditor securus est*: Inst. 3. 23, 3. Bayley, J., thus states the English rule: "Where goods are sold and nothing is said as to the time of delivery, or the time of payment, and everything the seller has to do with them is complete, the property vests in the buyer, so as to subject him to the risk of any accident which may happen to the goods": *Bloxam v. Sanders*, 4 B. & C. 941, at 948. See *Rugg v. Minett*, 11 East, 210, at 217; per Lord Ellenborough, C.J.: "Everything having been done by the settlers, which lay upon them to perform, in order to put the goods in a deliverable state in the place from whence they were to be taken by the buyers, the goods remained there at the risk of the latter." Tenant covenanting to repair, damage by fire only excepted, continues liable to payment of rent notwithstanding the premises are destroyed by fire: *Hare v. Groves*, 3 Anstr. 687. If he covenants without the exception, his duty is to rebuild: *Bullock v. Dommitt*, 6 T. R. 650. A tenant at will is not liable for general repairs, and *a fortiori* not to rebuild: *Horsefall v. Mather*, Holt (N.P.) 7. The rule seems to be: when the law creates a duty and the party is disabled to perform it without any default in him, and he has no remedy over, the law will excuse him; but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract: *Paradine v. Jane*, Aleyn, 26; and an anonymous case in Dyer, 33 (10). Cp. *Sale of Goods Act*, 1893 (56 & 57 Vict. c. 71), ss. 20, 33; *Benjamin, Sale* (4th ed.), 657; *Chalmers, On Sale of Goods Act*, 1893 (2nd ed.), 35, 36; *Brecknock and Abergavenny Canal Navigation Company v. Pritchard*, 6 T. R. 750; *Hinde v. Whitehouse*, 7 East, 558; *Martineau v. Kitching*, L. R. 7 Q. B. 436. The maxim is considered in the House of Lords in *Bayne v. Walker*, 3 Dow (H. L.) 233,

workman has employed his own materials, says the same authority,¹ as accessorial to those of the employer, he is entitled to be paid for them if the thing perishes before it is completed.

Bell, in his Commentaries,² has reduced the law on this subject Bell's rules. to three rules, which are accepted by the authorities as a satisfactory compendium of the law:

1. If the work is independent of any materials, or property of the employer, the manufacturer has the risk, and the unfinished work perishes to him.

2. If he is employed in working up the materials, or adding his labour to the property of the employer, the risk is with the owner of the thing with which the labour is incorporated.³

3. If the work has been performed in such a way as to afford a defence to the employer against a demand for the price if the accident had not happened (as if it were defectively or improperly done), the same defence will be available to him after the loss.

"These principles," says Story,⁴ "seem also well founded in Approved by Story. the common law, and will probably receive the like adjudication in each of these cases whenever it shall arise directly in judgment."

Prima facie, they apply to those who enter into contracts for Blackburn, J., in Appleby v. Myers. doing work and supplying material. Blackburn, J., however, points out, in delivering the judgment of the Exchequer Chamber in *Appleby v. Myers*,⁵ that there is nothing to render it either illegal or absurd in the workman to agree to complete the whole, and to be paid when the whole is complete, and not till then. Where such an agreement exists, in the event of a fire destroying the incomplete work, the workman must replace it in order to fulfil his contract. *Anderson v. Morice*⁶ illustrates this aspect of the law. The decision there was, that since the property in the cargo in question did not pass to the purchaser before the loading was complete, and since before that happened, the ship on which the

and in the Scotch cases of *M'Intyre v. Clow*, 2 Rettie 278; *Richardson v. County Road Trustees of Dumfriesshire*, 17 Rettie 805; *Brewer v. Duncan*, 20 Rettie 230.

¹ Pothier, *Traité du Contrat de Louage*, n. 433, adopted by Story, *Bailm.* § 426.

² 1 Bell, *Comm.* (7th ed.) 486. Cp. *M'Intyre v. Clow*, 2 Rettie 278.

³ *Appleby v. Myers*, L. R. 2 C. P. 651; cp. *Menetone v. Athawes*, 3 Burr. 1592; *Gillett v. Mawman*, 1 Taunt. 137; 2 Kent, *Comm.* 591. ⁴ *Bailm.* § 426 a.

⁵ L. R. 2 C. P. 651. All the authorities on this branch of law are collected in the argument, *Howell v. Coupland*, 1 Q. B. D. 258. See the *Sale of Goods Act*, 1893 (56 & 57 Vict. c. 71), s. 18, r. 2.

⁶ 1 App. Cas. 713. "Merchants, according to my experience, attach very great weight to a stipulation as to who is to insure, as shewing who is to bear the risk of loss": per Blackburn, J., *Allison v. Bristol Marine Insurance Company*, 1 App. Cas. 209 at 229, approved by Lord Selborne, in *Anderson v. Morice, l.c.*, at 748. *Mucklow v. Mangles*, 1 Taunt. 318, laid down that if a person contracts with another for a chattel which is not in existence at the time of the contract, though he pays him the whole value in advance, and the other proceeds to execute the order, the buyer acquires no property in the chattel while unfinished in the hands of the maker. This was doubted in *Carruthers v. Payne*, 5 Bing. 270. See *Brice v. Bannister*, 3 Q. B. Div. 569.

cargo was being loaded had sunk, the property never passed out of the vendor, and the purchaser consequently was never in peril, and thus had no insurable interest. Had the loading been completed the result must have been otherwise.

Duties of the
bailee.

Next, of the duties of the bailee.

In this species of bailment every man is presumed to possess the ordinary skill requisite to the due exercise of the art or trade which he assumes. *Spondet peritiam artis.*¹ *Imperitia culpa adnumeratur.*² Thus, where a tailor receives cloth to be made into a coat, or a jeweller a precious stone, each of them is bound to do the work required from him in the course of his business in a workmanlike manner. He is required to bestow ordinary diligence, and that care and prudence which the average prudent man takes in his own concerns.³ For the contract is for mutual benefit; therefore the bailee is not answerable for slight neglect, nor for a loss by inevitable accident or irresistible force, or from the inherent defect of the thing itself, unless he took the risk on himself; 'he is only answerable for ordinary neglect.'

Exception to
liability.

There is one exception to this rule which must be noted. Though the bailee is bound to exercise care and skill adequate to the business he undertakes only, and if the thing entrusted to him perish without fault of his the loss will be the bailor's, yet, where the delivery has the effect of transferring the property, the result is different. On this point all the commentators cite "the famous law of Alfenus in the Digest":⁴ If an ingot of silver is delivered to a silversmith to make an urn, the whole property is transferred, and the employer is only a creditor of metal equally valuable which the

¹ *Post*, 987, notes 8 and 9.

² D. 50, 17, 132; Pothier, *Traité du Contrat de Louage*, n. 425, 426; Bell, *Principles of the Law of Scotland* (9th ed.), 106-108; 1 Bell, *Comm.* (7th ed.) 439, where in a note it is said: "There is a special law relative to 'ignorant smiths, who throw ignorance and drunkenness spillis and crukes men's horses throw schoyn in the quick.' It is enacted: 1. That a smith who shoes in the quick shall pay the cost of the horse till he be hale; 2. That he shall, in the meantime, find a horse for the journey; and, 3. That if the horse will not hale the smith shall pay his price to the owner. 1478, c. 11, 2 Act. Parl. 119."

³ D. 19, 2, 9, § 5. Gothofred's note on this passage is: *Imperitus autem nemo præsimitur in eo, in quo semel probatus est industrie plenius, ut Advocatus in judicialibus, negotiator mercatorum matricule adscriptus.*

⁴ D. 19, 2, 13, §§ 5, 6.

⁵ Story, *Bailm.* §§ 433, 437.

⁶ D. 19, 2, 31. Story, *Bailm.* § 439, where the references are given. Jones, *Bailments*, 102. Alfenus, who was a shoemaker, and afterwards turned to be a jurisconsult, is mentioned by Horace—

*Alfenus vaser omni
Abjecto instrumento artis clausaque taberna,
Sutor erat; sapiens operis sic optimus omnis
Est opifex solus, sic rex.*

Satires, bk. i. sat. 3, 130.

There is an article on him in Bayle's Dictionary, *sub nom.*, also in the preface to Pothier's *Pandects*, where is an account of all the jurists whose opinions are referred to in the Digest.

workman engages to pay in a certain shape, unless it is agreed that the specific silver, and none other, shall be wrought up into the urn.¹

This rule was sought to be applied in the American case of *Seymour v. Brown*.² A quantity of wheat was sent to a miller to be exchanged for flour at the rate of a barrel of flour for every five bushels of wheat. The miller mixed the wheat with the mass of the wheat of the same quality belonging to himself, and, before the flour was delivered, the mill, with all its contents, was destroyed by fire. It was held that, as there was no fault or negligence imputable to the miller, he was not responsible for the loss, and that the property was not transferred. Story, J., however, in *Buffum v. Merry*,³ considers that this case cannot be supported otherwise than on the ground that there was a bailment of the wheat to be ground into flour, or a *locatio operis faciendi*, and that the Court must have been of opinion that the facts did not prove a sale of the wheat or an exchange of it for flour at so many bushels per barrel. Kent, too, disapproves the decision.⁴ And Bronson, J., in *Smith v. Clark*,⁵ says that "the decision was virtually overruled in *Hurd v. West*, 7 Cow. 752, and see p. 756, note. The case of *Slaughter v. Green*, 1 Rand. (Va.) R. 3, is much like *Seymour v. Brown*. They were both hard cases, and have made bad precedents."

The case of *Seymour v. Brown* being, then, out of the way, the distinction is a plain one, and is clearly put by Cowen, J., in *Pierce v. Schenk*;⁶ where logs were delivered at a saw-mill on the terms that they should be sawn into boards within a specified time, and that each party should have half the boards. After delivery, a portion were sawn and the saw-mill proprietor (the miller, as he is called in the report) converted both boards and

¹ The rules of the Roman law as to the effect of the union of things apart from the intention of the owner in the transfer of property, are lucidly explained in a note on Sohm, *Inst. of Roman Law* (Eng. Trans.), 247.

² 19 Johns. (Sup. Ct. N. Y.) 44. There is a very full note on the cases on this point, 2 Parsons, *Contracts* (6th ed.), 133.

³ 3 Mason (U. S.) 478, at 480. See also Story, *Bailm.* §§ 193-4, 285.

⁴ 2 Comm. 589. See notes by the editors of the 12th and 13th editions.

⁵ 21 Wend. (N. Y.) 83. The Courts of the State of Vermont appear to be of a different opinion, and to uphold *Seymour v. Brown* within their jurisdiction: *Smith v. Niles*, 20 Vt. 315; *Downer v. Rowell*, 22 Vt. 347. This latter was a case where the obligation was to keep sheep "the full term of three years, and return the same or others in their place as good as they are." It was held that the property did not vest in the bailee till the return of "other sheep of equal quality." See 2 Parsons, *Contracts* (6th ed.), note at 136.

⁶ 3 Hill (N. Y.) 28. *Gregory v. Stryker*, 2 Denio (N. Y.) 628, is an interesting case: A wagon, almost worthless, was sent to be repaired; when finished, it became worth \$90, and the bill for repairing it was \$78½. When it was taken in execution for the workman's debt, the Court held that, "as a general proposition, where the owner of a damaged or worn-out article delivers it to another person to be repaired and renovated by the labour and materials of the latter, the property in the article as thus repaired and improved is all along in the original owner, and not in the person making it." The judgment of Beardsley, J., is well worthy of perusal.

Cowen, J.'s,
judgment.

logs to his use. The question was whether trover was properly brought. "Had," says the learned judge, "the contract by the parties been one of sale, as if the defendant had taken the logs under a promise to return boards generally of equal value to one-half of the boards to be made out of them, the decision of the judge would have been erroneous. But this was not the case. The plaintiff delivered his logs to the defendant, who was a miller, to be manufactured into boards—a specific purpose, from which he had no right to depart. On completing the manufacture, he was to return the specific boards, deducting one-half as a compensation for his labour. It is like the case of sending grain to a mill for the purpose of being ground, allowing the miller to take such a share of it for toll. This is not a contract of sale, but of bailment—*locatio operis faciendi*. The bailor retains his general property in the whole till the manufacture is completed; and in the whole afterwards minus the toll. The share to be allowed is but a compensation for the labour of the manufacturer, whether it be one-tenth or one-half. Thus, in *Collins v. Forbes*,¹ it appeared that Forbes furnished certain timber to one Kent, which the latter was to work up into a stage for the Commissioners of the Victualling Office, he to receive one-fourth of the clear profit and a guinea per week on the work being done. This was holden to be a bailment by Forbes." After citing a case, *Barker v. Roberts*,² the learned judge continues: "Nearly all the books concede the distinction laid down in *Jones on Bailments*, 102, between an obligation to restore the specific thing and a power or necessity of returning others equal in value. In the first case it is a regular bailment, in the second it becomes a debt."³

South
Australian
Insurance
Company v.
Randell.

The same view was adopted by the Privy Council in *South Australian Insurance Company v. Randell*.⁴ Corn was deposited by farmers with a miller to be stored and used as part of the current consumable stock or capital of the miller's trade, and

¹ 3 T. R. 316.

² 8 Greenl. (Me.) 101.

³ Another passage of the judgment may be reproduced here. "I am of opinion," says Cowen, J., at 31, "that when a manufacturer receives goods for the purpose of being wrought in the course of his trade, the contract is entire; and, without a stipulation to the contrary, he has no right to demand payment until the work is complete. *A fortiori* he has no right to carve out payment for himself without consulting the bailor. A miller is entitled to take toll from your grist, on grinding it; but he chooses to grind only a part, and then sell the whole. He is not entitled to his toll for what he actually ground. It is like the common case of a man undertaking to labour during a certain time, or in finishing a certain amount of work for so much. Till the labour be performed, he can claim nothing." Cp. *Cutter v. Powell*, 2 Sm. L. C. (9th ed.) 1.

⁴ L. R. 3 P. C. 101, distinguished in *In re Williams*, 31 Upp. Can. Q. B. 143, where the engagement was to deliver a barrel of flour of a specified quantity for so many bushels of wheat, on the ground that nothing remained uncertain except the price.

was by him mixed with other corn deposited for the like purpose, subject to the right of the farmers to claim an equal quantity of corn of like quality, though without reference to any particular corn. The Judicial Committee of the Privy Council held the dealing to be a sale and not a bailment. Their opinion is thus summed up: ¹

“ It comes to this, that where goods are delivered upon a contract Judgment. for a valuable consideration, whether in money or money's worth, then the property passes. It is a sale and not a bailment. In the case of mixture by consent, the identity of the specific property of each who consents is no longer ascertainable, and the mixed property belongs to all in common. It may perhaps be regarded, under special circumstances, as the case of persons having a common property, and if they all concur in a bailment of this property, all may require a re-delivery of what they have so put in bailment. It may be that in such a case each might claim separately to have an aliquot part of the whole restored to him; but here the current stock was, from its very nature liable to be changed from day to day both in quantity and quality. The delivery was not for the peculiar or primary purpose of storage *simpliciter*, as in the case of a bailment of property to be returned to one bailor, or of any part to one or more of several joint bailors; but the wheat was delivered by each farmer independently to be stored and used as part of the current stock or capital of the miller's trade. There seems to be no ground upon which a banker is held not to be a trustee, or a banker's current capital not to be trust property, that is not applicable in principle to the case of the miller and his current stock of wheat, which is his trading capital.” ²

Besides the duties already set out, there are others implied on the part of the bailee of work on a thing—such as the duty of observing good faith and practising no imposition on his employer as to his services. When his work is done, he is bound to return the thing upon which he has worked to his employer. This last obligation is, however, subject to his right to a lien where, by his labour and skill, he has conferred increased value on the thing bailed to him. ³ This lien only exists when he who claims it is a bailee Duty to observe good faith and to return the thing worked on. Lien.

¹ L. R. 3 P. C. at 113.

² See *Foley v. Hill*, 2 H. L. C. 28, and *ante*, 909. The case may occur of the purchase of a certain definite quantity from a larger body; when by the English law, in general, the right does not pass till the vendor has made his selection. “ If I agree,” says Bayley, J., “ to deliver a certain quantity of oil as ten out of eighteen tons, no one can say which part of the whole quantity I have agreed to deliver until a selection is made. There is no individuality till it is divided ”: *Gillett v. Hill*, 2 Cr. & M. 530, distinguished in *Knights v. Wiffen*, L. R. 5 Q. B. 660; *Campbell v. Mersey Docks and Harbour Board*, 14 C. B. N. S. 412. The American law does not seem to coincide: *Russell v. Carrington*, 42 N. Y. 118; *Waldron v. Chase*, 37 Me. 414; 2 *Parsons, Contracts* (6th ed.), 137.

³ *Chapman v. Allen*, 3 Cro. (Car.) 271; *Jackson v. Cummins*, 5 M. & W. 342, at 349.

under the contract *locatio operis faciendi*, and therefore has no application in the case of a journeyman or day-labourer or in any like case where the possession is that of the employer, and where the only security for the payment of wages is the employer's personal responsibility on the contract of hiring.¹

Where thing
not worth the
price agreed
to be paid.
Farnsworth v.
Garrard.

There was for some time uncertainty as to the rule of law, where the work contracted for was done, but so imperfectly that it was not worth the price agreed to be paid. In *Farnsworth v. Garrard*² the settled rule was thus stated by Lord Ellenborough: "The late Mr. Justice Buller thought (and I, in deference to so great an authority, have at times ruled the same way) that in cases of this kind, a cross-action for the negligence was necessary, but that if the work be done, the plaintiff must recover for it. I have since had a conference with the judges on the subject; and I now consider this as the correct rule—that if there has been no beneficial service, there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand, leaving the defendant to his action for negligence. The claim shall be co-extensive with the benefit."³ If the work is left unfinished by the wilfulness of the workman, in the case of his having undertaken to do the whole, he is disentitled from recovering anything.⁴

Portion of the
contract of
hire of labour
and services
does not
involve
bailment.

It must be obvious that so far we have considered only a portion, and that the least important portion, of the relations raised by the contract of hire of labour and services—viz., that which has reference to the bailment of goods for work to be done upon them. There is another aspect of the same subject—and this the most extensive—where contracts of hire and services are made for the work of architects, auctioneers, bankers, stockbrokers, solicitors, surgeons, and the rest—which demands careful and detailed consideration, but where no actual bailment of property is involved. Since, then, we are at present concerned with bailments in the more tangible meaning of the term, the discussion of the duties raised by these relations are postponed, and subsequently discussed in other connections.⁵

¹ *M'Intyre v. Carver*, 2 Watts & Serg. (Pa.) 392.

² 1 Camp. 38. Cp. *Fisher v. Samuda*, 1 Camp. 190.

³ This rule had been anticipated in *Basten v. Butter*, 7 East 479, and partially adopted before in *King v. Boston*, 7 East 481 n. See *Mondel v. Steel*, 8 M. & W. 858; *Rigge v. Burbidge*, 15 M. & W. 598. In *Davis v. Hedges*, L. R. 6 Q. B. 687, it was held that, though in an action for the price of work the defendant may set up that the work has been defectively done in reduction of damages, he is not bound to do so, but may bring his separate action in respect of the claim. In *Caird v. Moes*, 33 Ch. Div. 22, *Davis v. Hedges* was distinguished by Cotton, L.J., at 34, and by Lindley, L.J., at 35.

⁴ *Sinclair v. Bowles*, 9 B. & C. 92.

⁵ It is difficult to classify a case like *Renihan v. Wright*, 21 Am. St. R. 249, which is an action for breach of the bailment of a corpse, brought against the undertaker, for

(B) Hire of custody or the receiving of goods on deposit for a reward for the custody thereof. (B) Hire of custody.

This is the second subdivision we have proposed of the *locatio operis*, or the hiring of labour and services. Sir William Jones,¹ speaking of the bailee in this case, says: "He is clearly responsible, like other interested bailees, for *ordinary* negligence; and although St. German seems to make no difference in this respect between a *keeper of goods for hire* and a simple depositary, yet he used the word *default*, like the *culpa* of the Romans, as a generical term, and leaves the degree of it to be ascertained by the rules of law."² Sir Wm. Jones's statement of the duty.

In this relation the duty to re-deliver may cause difficulty. In the United States it has several times been decided that where a person in the character of a bailee undertakes to deliver specific goods on demand, though the demand may be made wherever he may be at the time, his offer to deliver at the place where the property is, or at his dwelling-house or place of business, will be sufficient.³ Duty to re-deliver.

To this subdivision are to be referred the duties of agisters of cattle, factors, forwarding merchants, warehousemen, and wharfingers, whose cases we now proceed to consider in their order.

a. As to *agisters of cattle*.

Agistment⁴ is "where other men's cattle are taken into any Agisters of cattle.
Definition.

negligent delay in the delivery of a dead body. *Hale v. Bonner*, 27 Am. St. R. 850, may be cited in some parts of the United States for the proposition that a widow is entitled to recover for mental suffering as an element of damages in an action against a railroad company for their delay in the delivery of her husband's body, forwarded upon such railroad. See another curious case as to the widow's rights to the custody of the body of her deceased husband, *Larson v. Chase*, 28 Am. St. R. 370. In England "A dead body by law belongs to no one, and is, therefore, under the protection of the public. If it lies in consecrated ground the ecclesiastical law will interpose for its protection; but, whether in ground consecrated or unconsecrated, indignities offered to human remains in improperly and indecently disinterring them, are the ground of an indictment": per Byles, J., *Foster v. Dodd*, L. R. 3 Q. B. 67, 77. Cp. 2 Russell, Crimes (5th ed.) 256; Phillimore, Eoc. Law, 878.

¹ Bailm. 97.

² Doctor and Student, dial. 2, c. 38. There is a rather quaint, possibly equivocal note, to the preface of the 18th edition of this work dated 1815: "The original author was Christopher St. Germain of the Inner Temple, a barrister of such extensive knowledge in the laws of his country, that he was supposed to be equal to most men of his time." For a juster estimate of St. Germain, as Kent writes the name, or St. German as it is more frequently written, see 1 Kent, Comm. 504. See also Fuller, Worthies of England, London, 212, where there is a very quaint and appreciative notice of St. German.

³ As to delivery generally, see *post*, 1087. In 2 Kent, Comm. 508, at 509, it is said: "On a valid tender of specific articles the debtor is not only discharged from his contract, but the right of property in the articles tendered passes to the creditor. The debtor may abandon the goods so tendered; but if he elects to retain possession of the goods, it is in the character of bailee to the creditor, and at his risk and expense." As to bailment of a coat delivered to the waiter while dining at a restaurant: *Ultzen v. Nichols* (1894), 1 Q. B. 92.

⁴ Tomlin, Law Dictionary, art. Agistment. For this he cites 2 Co. Inst. 643. Jacob's Law Dictionary has the same passage, and the same authority for it; I am unable to verify it. In 4 Co. Inst. c. 73, The Courts of the Forests, 293, there is the following: "Agistator, so called, because he taketh beasts to agistment, that is, to depasture within the forest, or to feed upon the pawnsage, and cometh of the French word, *gyser*, to

ground at a certain rate per week; it is so called because the cattle are suffered *agiser*—that is, to be *levant* and *couchant* there; and many great farms are employed to this purpose." Blackstone says: ¹ "If a man takes in a horse or other cattle to graze and depasture in his grounds, which the law calls *agistment*, he takes them upon an implied contract to return them on demand to the owner."²

History of the term.

In the king's forests there were frequently demesne woods and lands, which were kept inclosed, in addition to the waste lands, that lay open for common to the inhabitants of the forest. Certain officers were appointed to the charge of these, who were called "the king's agisters of his forest." Their duty was to take in for money the beasts and cattle of every person, being an inhabitant within the forest, who was entitled to have common of herbage within the forest. The taking in of cattle to pasture or feed by the week or otherwise, was called agisting of beasts or cattle, and the common of herbage that was afforded was called agistment.³

Its wider signification.

This strictness of language very early gave place to a more general meaning, and agistment came to signify the common of herbage of any kind of ground or land, or the money received for the same. An agister was one who received and took in the beasts and cattle of every person in his land for hire to have pasture there. If, however, a man had only common by a specialty in a certain place and had no cattle of his own to common he was not allowed to agist other men's cattle.⁴

Charta de Foresta.

The transition from the limited to the broad sense of the term may be traced through an article in the *Charta de Foresta*⁵ in these words: *Unusquisque liber homo agistet boscum suum in foresta pro voluntate sua et habeat pannagium suum*: since, from the chartered right of every freeman to agist his own lands and woods within the forest, the application of the same name would be easy and natural

lye, because the beasts that feed there are there *levant* and *couchant*, lying and rising. And his office consisteth in *agitando, recipiendo, imbreviando, et certificando*." "*Agistamentum*," says Tomlin, "from French *geyser, gister (jacere)*, because the beasts are *levant* and *couchant* during the time they are on the land." Manwood, *The Forest Laws*, at 194, derives agist and *agistamentum* from the Latin *agito*, to drive, "for of this verb, *agito*, to drive or to feed, the lawyers have framed this verb, *agisto*, to feed or to agist (by adding thereunto this letter *s*), and then of *agisto*, *agistamentum*, the feeding or agistment of beasts or cattel, with herbage or mast." *Agistement de bestes est ou la bestes viment en ma pasture joe pus prendre de chekune beste un denier ou mayle*: Y. B. 22 Ed. I. (Horwood's ed.) 363. Cp. Murray, *Eng. Dict.* *sub voc.* Agist, Agistment, Agistor.

¹ 2 Comm. 452.

² *Chapman v. Allen*, 3 Cro. (Car.) 271.

³ Manwood, *Laws of the Forest*, c. 11, Of Agistment, and what Agistment is, 180-194. Cp. Com. Dig. Chase (O 1) (Q 6).

⁴ In *Lib. Assis.* 22 Ed. III. 103, pl. 84; Manwood, *Laws of the Forest*, 182.

⁵ 9 Hen. III. c. 9. (Ruffhead): referred to in *Revised Statutes* as 25 Ed. I.

to the exercise of the right that every man had to let his own land outside the boundaries of the forest for a purpose not unlawful.

At common law the duty of a bailee with whom cattle were left to be fed for reward is to take reasonable care of them, not "to take care of and re-deliver them to the bailor."¹ Or, as the law is stated by Blackburn, J., in *Smith v. Cook*:² "An agister does not insure the safety of the horses entrusted to him, he is bound to take reasonable care of them, and if they are killed through his negligence he is liable." The words used by Quain, J., in the same case, are "proper care."³

In the earlier case of *Broadwater v. Blot*⁴ an agisted horse was proved to have strayed out of the defendant's field, and was lost; on this evidence plaintiff claimed to be entitled to a verdict. The counsel for the defendant objected, contending that "direct and positive negligence" must be shewn—"either an insufficiency of fences, by reason of which the horse strayed, or that the defendant permitted the gates to be open for an unreasonable length of time." Gibbs, C.J., however, negatived this, observing: "All the defendant is obliged to observe is reasonable care. He does not insure; and is not answerable for the wantonness or mischief of others. If the horse had been taken from his premises, or had been lost by accidents which he could not guard against, he would not be responsible. I admit that particular negligence must be proved, by occasion of which the horse was lost, or gross general negligence, to which the loss may be ascribed, in ignorance of the special circumstance which occasioned it. If there were a want of due care and diligence generally, the defendant will be liable. The question is, were the defendant's fences in an improper state at the time the horse was taken in to agist? Did he apply such a degree of care and diligence to the custody of the horse as the plaintiff, who entrusted the horse to him, had a right to expect?"

The Roman law made the agister responsible, not only for reasonable diligence, but for reasonable skill in his business: *Si quis vitulos pascendos . . . conduxit culpam eum præstare debere*;

¹ *Corbett v. Packington*, 6 B. & C. 268.

² 1 Q. B. D. 79, at 81. In *Oliphant, Law of Horses* (4th ed.), 241, a *Nisi Prius* case of *Gaunt v. Smith* is noticed, which was tried before Pollock, C.B., and in which that learned judge directed a nonsuit. The action was brought by the owner of a pony injured while agisted to the defendant by being kicked by a horse whose shoes had not been taken off. The case is cited as being overruled by *Smith v. Cook*. This, however, nowhere appears in the report, and the distinction between putting a horse shod in a field with a pony, and a horse and heifer in a field to which there is access by a bull, seems sufficiently wide to warrant very different considerations being applied. The test is "reasonable care" in both cases.

³ 1 Q. B. D. at 83.

⁴ *Holt (N. P.)* 547. In the American case of *Sargent v. Slack*, 47 Vt. 674; 19 Am. R. 136, where some sheep had escaped through a defective fence, the agister was held liable.

*et quod imperitiā peccavit, culpam esse; quippe ut artifex conduxit.*¹

Story² says the common law rule is the same.

Agister no
lien.

Livery stable
keepers.

An agister has no lien, for he merely provides food and takes care of the animals entrusted to him; neither has a livery stable keeper.³ Between the business of an agister and that of a livery stable keeper there is very little difference; they are both comprehended under the same principle, and the duty of both differs from an inn-keeper's, which is much more extensive.⁴

Searle v.
Laverick.

Judgment of
Blackburn, J.

The duties of a livery stable keeper with regard to negligence were much discussed in the case of *Searle v. Laverick*:⁵ "We take it to be established law that by the custom of England, this extreme liability, making the bailee an insurer, is confined to carriers and innkeepers, and that livery stable keepers and warehousemen come within what Lord Holt calls the second sort, as to which he says: 'The second sort are bailiffs, factors, and such like.' As to this sort, he says the bailee is only bound to take reasonable care; and *"the true reason of the case is, it would be unreasonable to charge him with a trust further than the nature of the thing puts it in his power to perform it.* But it is allowed in the other cases' (i.e., the carrier and innkeeper), 'by reason of the necessity of the thing.' The obligation to take reasonable care of the thing entrusted to a bailee of this class involves in it an obligation to take reasonable care that any building in which it is deposited is in a proper state, so that the thing therein deposited may be reasonably safe in it." This statement of the law was made in a case where plaintiff had sent his horse and two carriages to a livery stable keeper, who had put the carriages in a building, which fell, smashing them. The building was not finished at the time, and was in the hands of contractors, who were competent men, though the evidence was they had done this particular work unskillfully. The judge, at the trial, had ruled⁶ "that defendant's liability is that of an ordinary bailee for hire, and that all he was bound to do was to use ordinary care in the keeping of the plaintiff's carriages, and that, if in causing the shed to be built he did all that he did, by employing a builder and otherwise, with such care as an ordinary careful man would use therein, he would be protected, and would be exempt from liability for an event which was caused by the

¹ D. 19, 2, 9, § 5.

² Bailm. § 443.

³ *Jackson v. Cummins*, 5 M. & W. 342; *Grinnell v. Cook*, 3 Hill (N.Y.) 485. The trainer of a race-horse was said to have a lien on the horse he trained in *Bevan v. Waters*, 3 C. & P. 520; but this was qualified in *Forth v. Simpson*, 13 Q. B. 680, by the limitation that the lien only existed where the owner had not the right of removing him to run at any race he pleased.

⁴ *Calye's Case*, 8 Co. Rep. 32 a., 1 Sm. L. C. (9th ed.), 132.

⁵ L. R. 9 Q. B. 122, per Blackburn, J., at 126.

⁶ L. c. at 124.

careless or improper conduct of the builder, of which the defendant had no notice;" and this direction was sustained by the Queen's Bench.¹

Horses and carriages standing at a livery stable are distrain-
able for rent² if they are sent to stand there to be kept; but if horses are sent there *merely* to be cleaned and fed, or carriages to be cleaned or repaired, there is a difference,³ and they may be retained only during the performance of the purpose for which they are sent, or, in the latter case, while the labour or skill of the artisan is being exerted on them. They are in like case with a "horse sent to the farrier to be shod: the horse is necessarily taken there for the purpose, and necessarily remains there while it is being performed. Such likewise is the case of the tailor, who, it seems, formerly received the materials from the employer, to be fashioned into garments. The cloth, or other material, was sent to the shop for the mere purpose of having work done upon it, and was to be returned in an altered shape." The livery stable keeper may, however, have a lien by special agreement,⁴ though not at common law, even for money expended on a horse standing at livery at the request of the owner.⁵

Horses and carriages at a livery stable.

¹ Two cases, *Brazier v. Polytechnic Institution*, 1 F. & F. 507, and *Pike v. Polytechnic Institution*, 1 F. & F. 712, are often cited as negating any warranty of a staircase which fell. They are referred to in *Montague Smith, J.'s*, judgment in *Readhead v. Midland Railway Company*, L. R. 4 Q. B. 379, at 385.

² *Parsons v. Gingell*, 4 C. B. 545. In *Miles v. Furber*, L. R. 8 Q. B. 77, Cockburn, C.J., seems to reflect on *Parsons v. Gingell*, and to regard it as inconsistent with *Swire v. Leach*, 18 C. B. (N. S.) 479. *Parsons v. Gingell*, however, was decided on the authority of *Francis v. Wyatt*, 3 Burr. 1498, 1 W. Bl. 482, which is approved in *Gorton v. Falkner*, 4 T. R. 565, while in *Swire v. Leach*, *Parsons v. Gingell* was cited and not disapproved. The ground of the decision in *Swire v. Leach* was, that a pawnbroker's pledges fall within the description of "things delivered to a person exercising a public trade, to be managed in the way of his trade," which is the second head of exception treated of in *Willes, C.J.'s*, judgment in *Simpson v. Hartopp*, *Willes (C. P.)* 512. The ground of the decision in *Parsons v. Gingell* is that horses and carriages standing at livery are not within the exception, and that the allegation in the plea in bar that it was the duty of the livery stable keeper to feed and clean the horses, &c., was not sufficient to bring the case within the exception, "otherwise any goods sent to remain and be kept upon premises which it was necessary occasionally to dust, cover, or clean, would be exempt from distress." *Miles v. Furber*, at first sight appears the very case here put. It may be pointed out, however, that in *Miles v. Furber* the goods were deposited in the plain and necessary course of the business of a warehouseman. If there were no deposits, no business of the kind professed could be carried on. In *Parsons v. Gingell* the business of a livery stable keeper might well go on without any such transactions as those questioned. As *Coltman, J.*, points out, *Parsons v. Gingell*, 16 L. J. C. P. 227, at 231, if the Courts were at liberty to legislate the considerations urged by the judges in *Gilman v. Elton*, 3 B. & B. 75, would have a preponderant weight. In the C.B. report of this passage Lord Abinger's remarks in *Muspratt v. Gregory*, M. & W. 633 are substituted. The decision in *Parsons v. Gingell* might be avoided in any future case by framing the allegations in the statement of claim within the principle of the second exception to *Simpson v. Hartopp*, and alleging a substantial business and not a mere incidental proceeding. *Mellor, J.'s*, statement in *Miles v. Furber*, that *Swire v. Leach* is an authority that pledges are privileged from distress, "must of course be limited to pawnbroker's pledges."

³ *Per Wilde, C.J.*, *Parsons v. Gingell* 4 C. B. 545, at 558, 559.

⁴ *Donatty v. Crowther*, 11 Moo. (C. P.) 479.

⁵ *Orchard v. Rackstraw*, 9 C. B. 698.

If a person negligently lets an unsuitable horse, it is not a defence that he was ignorant that the horse was unsuitable;¹ although one who lets a horse does not warrant its freedom from defects which he does not know of and could not have discovered by the exercise of due care;² for the exercise of a common calling only required a man to shew skill in his business,³ and liability for a horse, apart from bailment, is confined to cases where the owner has notice of the dangerous tendency.⁴

Factors.

β. As to factors.⁵

Before treating specially of factors, some general principles of the Roman law not previously noted under mandate of agency may be indicated as a guide to English principle.⁶ An agent is bound to execute the commission he has undertaken,⁷ or to give timely notice when he is unavoidably prevented from doing so.⁸ In the execution of his commission he must shew *exacta diligentia*.⁹ If he has authority to delegate it he must answer for *culpa in eligendo*,¹⁰ if he has not authority to delegate it, he must execute the commission in person. He must account for all his principal's property that comes to his hands, including fruits and interest, though he is discharged from responsibility if he can shew a loss through no fault of his own.¹¹ He must restore, at the expiration of his commission, all property belonging to his principal that remains under his control or for which he remains answerable, and render full accounts of his receipts and expenditure to his principal, and allow him to exercise all rights of action which he as agent has acquired against third persons. On the other hand, the principal must indemnify the agent for all reasonable expenses incurred in his agency.¹²

Definition of factor.

A factor is described by Abbott, C.J., "as a person to whom goods are consigned for sale by a merchant, residing abroad, or at a distance from the place of sale, and he usually sells in his own

¹ *Horne v. Meakin*, 115 Mass. 326.

² *Copeland v. Draper*, 157 Mass. 558, 34 Am. St. R. 314.

³ *Rex v. Kilderby*, 1 Wms. Saund. 311, at 312 and n. 2.

⁴ *Cox v. Burbidge*, 13 C. B. N. S. 430.

⁵ Story, Agency, §§ 33, 34; 3 Chitty, Commerce and Manufactures, 193-224, Factors and Brokers; 3 Parsons, Contracts (6th ed.), 258.

⁶ See generally Hunter, Roman Law (2nd ed.), 609-626, and particularly the discussion of Savigny's position, at 621-622, that while the old law of non-representation was maintained in regard to the formal contract of *stipulatio*, yet that in the later Roman law agency was universally allowed in the non-formal contracts.

⁷ *Si susceptum non impleverit, tenetur*, D. 17, 1, 5, § 1; *quod mandatum susceperit; denique tenetur, etsi non gessisset*, D. 17, 1, 6, § 1; *de lite, quam suscepit exsequendam, mandati eum teneri constat*, D. 17, 1, 8, § 2.

⁸ D. 17, 1, 27, § 2.

⁹ *A procuratore dolum et omnem culpam non etiam improvisum casum præstandum esse*: Code 4, 35, 13.

¹⁰ D. 17, 1, 8, § 3.

¹¹ D. 17, 1, 10, §§ 2, 9.

¹² D. 17, 1, 3, § 2; D. 17, 1, 8, § 9; D. 17, 1, 28; D. 17, 1, 38.

name without disclosing that of his principal; the latter, therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name."¹

A factor differs from a merchant in that a merchant buys and sells for his own profit; the factor so far, that is, as concerns his principal, buys and sells only on commission.² A factor differs from a broker³ in that a broker is not trusted with the possession of goods, and ought not to sell in his own name.⁴ Lastly, he differs from an agent in that his authority is extended to the management of all the principal's affairs in the place where he resides, or in a particular department; while an agent is one entrusted with the accomplishment of a particular act or course of dealing. The agent's powers within the range of the thing committed to him are similar to those of a factor, unless where they are expressly limited.⁵

Distinctions between the functions of a factor, a merchant, a broker, and an agent.

It is a general principle of the common law, that all persons are capable of acting as agents who are of sound mind, and who have no interest or employment adverse to their principals;⁶ for the office of an agent is merely ministerial. In the case of a factor, the reason is not applicable; since the factor has rights and liabilities which cannot be enforced against a person labouring under disability;⁷ therefore, it seems that those only may be factors who are *sui juris*.⁸

Qualifications of agents and factors.

¹ Baring v. Corrie, 2 B. & Ald. 137, at 143. "The definition of a factor, I thought, always was that which is laid down in Smith's Mercantile Law, where it is said: 'There are two extensive classes of mercantile agents, namely, factors who are entrusted with the possession as well as the disposition of property, and brokers who are employed without being put into possession of the goods.' As for limiting that definition by restricting it to persons entrusted with goods from abroad, I never before heard of such a limitation, and I think it must be rejected": per Brett, J.A., *Ex parte Dixon, In re Henley*, 4 Ch. Div. 133, at 137, where *Semenza v. Brindley*, 18 C. B. (N. S.) 467, is explained. The Factors Act, 1889 (52 & 53 Vict. c. 45) gives the expression "Mercantile Agent" as a generic term, including both brokers and factors.

² Lord Stowell's judgment in *The Matchless*, 1 Hagg. Adm. Rep. 97, at 101.

³ As to brokers generally, see Story, Agency, §§ 28-32a, Com. Dig. Merchant (B), Factor, and the notes. *Clarke v. Powell*, 4 B. & Ad. 846, where the various statutes are considered; *Smith v. Lindo*, 27 L. J. C. P. 196, 335. As to the powers and duty of a broker, *Robinson v. Mollett*, L. R. 7 H. L. 802. As to broker at a foreign port to find a cargo for a ship, and his powers, *Stumore, Weston and Company v. Breen*, 12 App. Cas. 698.

⁴ Per Abbott, C.J., *Baring v. Corrie*, 2 B. & Ald. 137, at 143. See Com. Dig., Merchant (B), Factor; also Russell, Mercantile Agency (2nd ed.), 3 *et seqq.*

⁵ 1 Bell, Comm. (7th ed.), 506, where see the note. Kent, 2 Comm. 622, n. (b), says, an agent is a *nomen generalissimum*, and includes factors and brokers who are only a special class of agents. A factor is distinguished from a broker by being entrusted by others with the possession and disposal and apparent ownership of property, and he is generally the correspondent of a foreign house. A broker is employed merely in the negotiation of mercantile contracts, and is not trusted with the possession of goods and does not act in his own name. His business consists in negotiating exchanges or in buying and selling stocks and goods; but in modern times the term includes persons who act as agents to buy and sell, and who charter ships and effect policies of insurance.

⁶ Co. Litt. 52 a; Story, Agency, § 9.

⁷ Russell, Mercantile Agency (2nd ed.), 6.

⁸ Story, Bailm. § 162; Code Civil, art. 1990.

Extent of
factor's
authority.

The extent of a factor's authority is to be gathered from the commission under which he acts. If the commission be general, it is to be construed according to its object, and implies all powers within the scope of the employment, "and the general words ought to receive the most liberal construction, which construction should, as far as possible, place the attorneys where the executrix intended to place them, in her room and stead, invested with all her authority and with all her discretion."¹ Even if the commission be special, the factor's authority includes all necessary and usual means of giving it effect,² though where the factor has express instruction he must pursue them strictly.³ A factor cannot, without express power, or power necessarily implied, delegate his authority to another.⁴ His authority is moreover to be construed according to the usage of trade. Thus, where there is a custom to sell goods upon credit, a factor may do so; nevertheless, he must not unreasonably extend the term of credit, and must use due diligence to ascertain the solvency of the purchaser.⁵ If the custom is to sell only for ready money, the factor's power is to that degree circumscribed.⁶ In an emergency, deviation from instructions is condoned.⁷

¹ Per Eyre, C.J., *Howard v. Baillie*, 2 H. Bl. 618, at 620.

² *Fenn v. Harrison*, 3 T. R. 757, 4 T. R. 177. Where there is a notorious custom to limit a broker's authority, it is the duty of third persons to ascertain the limit: *Baines v. Ewing*, L. R. 1 Ex. 320; see *Robinson v. Mollett*, L. R. 7 H. L. 802.

³ *Smart v. Sandars*, 3 C. B. 380, 5 C. B. 895; *Bostock v. Jardine*, 3 H. & C. 700. As to this case, *Mellor, J.*, in *Mollett v. Robinson*, in the Ex. Ch. L. R. 7 C. P. 84, at 101, says: It "is misreported in 3 H. & C., but appears to be more accurately reported in 34 L. J. It was tried before me at Liverpool; and I have referred to my notes, and I find that no question was put to the jury, but that I directed a verdict for the plaintiff, giving to the defendants leave to move to enter a verdict for the defendants, or a nonsuit; upon which it appears that the Court of Exchequer granted a rule, which was afterwards discharged; and the case is only an authority for that which was conceded in the argument, viz., that without the aid of the custom, no contract binding the defendant was made in the present case." See also per *Blackburn, J.*, at 111. *Catlin v. Bell*, 4 Camp. 183.

⁴ *Delegata potestas non potest delegari*. Broom, *Legal Maxims* (6th. ed.), 795; and list of cases there cited. Trayner, *Legal Maxims, sub voce*; *Cockran v. Irlam*, 2 M. & S. 301 n; *Ecosseaise Steamship Company Limited v. Lloyd*, 7 Times L.R. 76 (C. A.).

⁵ 2 Kent, Comm. 622.

⁶ *Wiltshire v. Sims*, 1 Camp. 258, to which case there is a note at 259. "Chambre, J., says: 'There is no doubt of the authority of a factor to sell upon credit, though not particularly authorized by the terms of his commission so to do: 'Houghton v. Mathews, 3 B. & P. 489; *Scott v. Surman*, Willes (C.P.), 407. But this doctrine is found on 'the constant and daily experience that factors do sell upon credit without any special authority,' and therefore confirms the general maxim that when an agent is employed to do any act, he shall be supposed to have an authority to do it in the manner in which it is usually done. Goods are almost always, stock is only exceptionally, sold upon credit; and hence the distinction between the powers of the factor and the stockbroker. An agent can in no case bind his principal by any act beyond the scope of his authority: *Fenn v. Harrison*, 3 T. R. 757."

⁷ *Hunter v. Parker*, 7 M. & W. 322; per *Parke, B.*, at 342: "The master has, by virtue of his employment, not merely those powers which are necessary for the navigation of the ship and the conduct of the adventure to a safe termination, but also a power, when such termination becomes hopeless, and no prospect remains of bringing the vessel home, to do the best for all concerned, and therefore to dispose of her for their benefit. It is a case of necessity when nothing better can be done for the benefit of the

At common law a factor had no power to pledge,¹ and a pledge by a factor did not even transfer the lien the pledgor himself had.² Now by statute that power has been made to attach to his possession. The consideration of his statutory powers in detail is, however, far from our present subject; therefore it will suffice to note that the various Acts are consolidated and amended by the Factors Act, 1889,³ and to refer to Benjamin on Sale (4th ed.), 17-23, 818-824, and 1 Bell's Commentaries. (7th ed.), 517-524, where the cases are fully considered.⁴

The next question is, what is the degree of diligence required of factors in the proper discharge of their duties? The rule suggested by all the analogies is that, as the contract is for the benefit of both parties, the factor is understood to contract for reasonable skill and ordinary diligence.⁵ By reasonable skill we are to understand such skill as is ordinarily exercised by persons of average capacity engaged in similar pursuits.⁶ The Roman law, in which *culpa* or *levis culpa* corresponds to ordinary neglect or the want of ordinary diligence,⁷ lays down a similar rule. *Spondet peritiam artis*,⁸ *Spondet diligentiam gerendo negotio parem*.⁹ *Imperitia culpe adnumeratur*.¹⁰ But *In negotio gerendo opus est master's employers; and that necessity is found to have existed in this case.*" 3 Chitty on Comm. and Manuf. 218.

Degree of diligence required of a factor.

¹ At 2 Kent, Comm. 625-8, the history of the common law in this respect is traced.

² *M'Combie v. Davies*, 7 East 5.

³ 52 & 53 Vict. c. 45.

⁴ Perhaps an even more authoritative, as well as full, examination of the law may be obtained from a perusal of the elaborate judgment of Blackburn, J., in the Exchequer Chamber, in *Cole v. North-Western Bank* L. R. 10 C. P. 354, at 357-374. Bramwell, B., shortly states the effect of the Factors' Act in the same case, at 376, as follows: "The statute was meant to apply to those cases where one person has given an apparent authority to another, and a third person has dealt with that other in the belief that the authority really existed." See also per Lord Herschell, *London Joint Stock Bank v. Simmons* (1892), App. Cas. 201, at 216. The pledge must not be for an antecedent debt, sec. 4. As to what is an antecedent debt, *Macnee v. Gorst*, L. R. 4 Eq. 315; *Kaltonbach v. Lewis*, 10 App. Cas. 617. In *Martinez y Gomez v. Allison*, 17 Rottie 332, a decision on 5 & 6 Vict. c. 39, it was said, at 335, by Lord Justice-Clerk Macdonald: "The Factors Act uses words inconsistent with the contention that any one who is a mere custodian can be held to be an agent. One who has possession merely that he may convey to another is not an agent." See *Hastings v. Pearson* (1893), 1 Q. B. 62. *Lee v. Butler* (1893), 2 Ch. 318, is a decision on sec. 9 of the Factors Act (52 & 53 Vict. c. 45), assimilating the holder of goods under a hire and purchase agreement to a mercantile agent for the purposes of the Act; so are *Helby v. Matthews* (1894), Q. B. 262 (C. A.); *Biggs v. Evans* (1894), 1 Q. B. 88; *Shenstone v. Hilton*, 10 Times L. R. 557; and *Strohmenger v. Attenborough*, 11 Times L. R. 7.

⁵ *Jones*, Bailm. 9, 10, 23, 86, 119, and the note in Theobald's edition, 84. As to the right of the pledgee to alienate the property: 1 Bell, Comm. (7th ed.), 516; *Story*, Bailm. §§ 23, 455.

⁶ See *ante*, 957, and *post*, Skilled Labour. *Chapman v. Walton*, 10 Bing. 57, at 63, per Tindal, C.J.; *Story*, Bailm. §§ 431, 434.

⁷ *Jones*, Bailm. 21-23.

⁸ Pothier, *Traité du Contrat de Louage*, n. 425.

⁹ *Jones*, Bailm. 98 n. (l); *Trayner*, *Legal Maxims*; *Bell*, *Principles of the Law of Scotland* (9th ed.), 106. I do not think either of these phrases occurs in the Digest. See the note to *Story*, Bailm. § 431. ¹⁰ *Jones*, Bailm. 23, n. (m). D. 50, 17, 132.

*diligentia atque industria; et is, qui mandat, diligentiam rei gerendæ convenientem exigere; et qui suscipit mandatum hoc ipso industriam et diligentiam ad rem exequendam necessariam in se futuram recipere videtur.*¹

A factor, then, is bound not only to good faith, but to reasonable diligence. He is not liable for any loss by fire, theft, robbery, or other accident unconnected with his own negligence.² He must act with reasonable care and prudence, and exercise his judgment³ after proper inquiries and precaution,⁴ and if he does this in good faith, he is not liable because the course adopted does not in the event prove the most judicious.⁵ If he omit inquiry, and sell to an insolvent person when ordinary diligence would have enabled him to find out his lack of credit, he will have to answer to his principal. So he will not be allowed to sell his own goods to a purchaser and take security for the price, and at the same time to sell the goods of his principal to the same person without security; for he is bound to use at least as much care and diligence in his principal's as in his own concerns.⁶ The factor is bound to sell his principal's goods for their fair market value;⁷ and he is further bound to follow the known course of business, if any such exists.⁸ Though following the known course of business in ordinary cases will protect him from liability, this will not cover what he has done if he has

¹ Vinn. Ad. Inst. 3, 27, 11, n. 2.

² Vere v. Smith, 1 Vent. 121, where it is said: "Shewing that he was robbed is giving an account." The duty there was to account.

³ Moore v. Mourgue, 2 Comp. 479. If a broker undertakes business and then abandons the employment, he is liable to the same extent as if he negligently caused the loss ensuing, Glaser v. Cowie, 1 M. & S. 52; Smith v. Price, 2 F. & F. 748, unless he gives timely notice to his principal of his inability. Callander v. Oelrichs, 5 Bing. N. C. 58; cp. Civil Law texts, ante, 984. In Park v. Hammond, 6 Taunt. 495, 4 Camp. 344, it was held gross negligence in an insurance broker employed to insure goods from a certain point in their voyage home, to effect a policy "at and from" that point "beginning the adventure from the loading thereof on board." Anderson v. Morice, 1 App. Cas. 713, may indicate the consequences flowing from such neglect. So, too, it is negligence to omit any usual term, Mallough v. Barber, 4 Camp. 150. In Ecosaise Steamship Company (Limited) v. Lloyd, 7 Times L. R. 76 (C. A.), Lord Esher, M. R., said: "In the case of a succession of brokers employed with the consent and on behalf of the principal, each broker was only liable for his own negligence. If one broker had authority to employ another broker, he would be liable if he did not take reasonable care to appoint a good broker; and if he did not take reasonable care, he would be liable for the negligence of that broker." In the case cited the negligence was not obtaining a charter party with a 'first-class signature.'

⁴ Per Abbott, C. J., Money Penny v. Hartland, 1 C. & P. 352, at 354 (the case, however, of a surveyor); Smith v. Cologan, 2 T. R. 188, n. (a). If in one part of the to do anything in the matter, he is as liable as if he does something amiss in his transaction the factor exceed his instructions, but makes a corresponding saving in another part, it seems that in equity at least he will be held excused: Cornwall v. Wilson, 1 Ves. Sen. 509. Pothier, Traité des Obligations, n. 78. Lord Kenyon, Miles v. Bernard, Peake, Add. Cas. 61, appears to be of opinion that if an agent acts on the best available advice he is not liable for damage arising from the action thence taken.

⁵ Comber v. Anderson, 1 Camp. 523; Lamert v. Heath, 15 M. & W. 486.

⁶ Story, Agency, § 186.

⁷ Bigelow v. Walker, 24 Vt. 149.

⁸ Wiltshire v. Sims, 1 Camp. 258.

acted negligently or *mala fide*.¹ So, too, if he have been guilty of any negligence or breach of duty, the effect of which has been to expose the goods entrusted to him to a peril by which they are damaged or destroyed, he will be liable; for whatever the immediate cause of the loss, the goods would not have been exposed to it but for the antecedent neglect of duty.²

A factor sometimes engages to guarantee his dealings, or to stand *del credere*,³ as the phrase is, on receiving a certain commission, which is called a *del credere* commission. To "stand *del credere*" in any transaction is to be answerable as if the person so binding himself were the proper debtor. Where, then, a factor employed to sell goods receives a *del credere* commission, he is liable to the principal for the price to be recovered, whether he ever receive it or not; and no payment that would not be effectual as between debtor and creditor will discharge his liability.⁴

Del credere
agents.

Del credere agents are liable in respect of their commission, although there is no guarantee in writing signed by them within section 4 of the Statute of Frauds;⁵ for their undertaking is not one to pay the debt of another within the section. As Parke, B., says,⁶ "being the agents to negotiate the sale, the commission is paid in respect of that employment; a higher reward is paid in consideration of their taking greater care in sales to their customers and precluding all question whether the loss arose from negligence or not, and also for assuming a greater share of responsibility than ordinary agents—namely, responsibility for the solvency and performance of their contracts by their vendees. This is the main object of the reward being given to them; and though it may terminate in a liability to pay the debt of another, that is not the *immediate* object for which the consideration is given."

Not within s. 4
of the Statute
of Frauds
(29 Car. II.
c. 3).

Parke, B.'s,
statement of
their position.

It has been contended that a factor who has actually received the money for the goods of his principal is in the same position as if he had agreed to stand *del credere*. This is not so. The factor's obligation is not increased, by reason of his receipt of the

Factor's
receipt of
remittance.

¹ *Sadock v. Burton*, Yelv. 202; *Anon.*, 12 Mod. 514 (case 857).

² *Caffrey v. Darby*, 6 Ves. 488, at 496; *Tobin v. Murison*, 5 Moo. P. C. C. 110.

³ "The phrase *del credere* is borrowed from the Italian language, in which its signification is exactly equivalent to our word, guaranty, or warranty." Story, Agency, § 33, and per Mellish, L.J., *Ex parte White, In re Nevill*, L. R. 6 Ch. 397, at 403.

⁴ *M'Kenzie v. Scott*, 6 Brown Parl. Cas. 280; *Houghton v. Matthews* (1803), 3 B. & P. 485; 2 Kent, Comm. 625, and note 1 by Mr. Holmes to the 12th ed. *Bramwell v. Spiller*, 21 L. T. (N. S.) 672, holds that an agent upon *del credere* commission is in no different position with regard to a vendee than any other agent, and cannot sue the vendee in his own name for a debt contracted between the principal and the vendee.

⁵ 29 Car. II. c. 3.

⁶ *Couturier v. Hastie*, 8 Ex. 40, at 56, reversed on another point, 9 Ex. 102, 5 H. L. C. 673. See per Blackburn, J., *Fleet v. Murton*, L. R. 7 Q. B. 126, at 132.; also *Sutton v. Grey* (1894), 1 Q. B. 285.

remittance from the purchaser, beyond what it was in the earlier stages of the business. He is obliged to use average judgment and discretion, but he does not guarantee the payment whatever may betide. In making the remittance, then—

1. If he follows the ordinary course of business ; or
2. If he remit the money by a banking house of recognized position and in good credit ;¹ or
3. If he remit in the way settled by either mercantile or local usage ;²

he will be free from liability.

Factor agent
for funds
coming to his
hands.

Clarke v.
Tipping:
judgment of
Lord Lang-
dale, M.R.

A factor or broker is an agent with regard to funds coming to his hands which are to be applied in a particular way, and the money paid to him may therefore be followed by his principal as far as it can be traced.³ Lord Langdale, M.R., in *Clarke v. Tipping*,⁴ the case of a fraudulent factor, expresses the broad principle on which a factor is to be judged: "Among the most important duties of a factor, are those which require him to give to his principal the free and unbiassed use of his own discretion and judgment, to keep and render just and true accounts, and to keep the property of his principal unmixed with his own or the property of other persons."⁵

Lord Eldon,
C.S.'s, judg-
ment in
Massey v.
Banner.

A distinction is taken between a payment to the account of the agent in the agent's bank and a payment into the agent's bank in the principal's own name. In the former case the factor is liable, in the latter not ; and on the ground stated by Lord Eldon in *Massey v. Banner*,⁶ "because, if he had become bankrupt it would have gone to the credit of his estate ; for it is clear in that case that if the bankers had any account with him by way of set-off, that set-off would affect equally his money and the money of the estate paid in to his account ; they have no notice that it belongs to the estate ; the account is between him and them. The same has been the case with executors and trustees, and I apprehend, that, for the safety of mankind, the principle must be, that if you desire to deal for me as you would for yourself, it must be so, that the dealing for me, if unfortunate, shall not be more so to me than it would have been to you if it had been for yourself."⁷

¹ *Knight v. Lord Plymouth*, 3 Atk. 480.

² *Russell v. Hankey*, 6 T. R. 12.

³ *Taylor v. Plumer*, 3 M. & S. 562, distinguished in *Lister v. Stubbs*, 45 Ch. Div. 1, at 5 ; *In re Hallett's Estate*, *Knatchbull v. Hallett*, 13 Ch. D. 696 ; *Ex parte Cooke*, *In re Strachan*, 4 Ch. Div. 123, a stockbroker's case, where the broker mis-applied funds, and his estate was held liable, on the footing that he was an agent.

⁴ 9 Beav. 284, at 292.

⁵ Per Lord Langdale, M.R., *Clarke v. Tipping*, 9 Beav. 284, at 292.

⁶ 1 Jac. & Walk. 241, at 248.

⁷ *Cp. Currie v. Misa* (Ex. Ch.), L. R. 10 Ex. 153, affirmed in H. of L. 1 App.Cas. 554.

An agent authorized to receive payment may not receive it in any way he chooses; the presumption is that he has only a power to receive it in money. "If the agent receives the money in cash, the probability is that he will hand it over to his principal; but if he is to be allowed to receive it by means of a settlement of accounts between himself and the debtor, he might not be able to pay it over; at all events, it would much diminish the chance of the principal ever receiving it; and, upon that principle, it has been held that the agent, as a general rule, cannot receive payment in anything else but cash."¹

There is a difference between the case of an agent whose duty it is to collect a debt and one who has to hand over a document of title against payment. In the former case, if "he collects it by a cheque which is dishonoured, I do not know that he would have broken his authority, because the creditor would remain in the same position as before. The debtor would not have paid, and the creditor could have pursued the debtor." In the latter: "Let us take a case that lawyers are familiar with—the sale of real property. Let us take the case of a solicitor who is entrusted by the vendor with the completion of the transaction. Is that solicitor justified by the ordinary course of business or the ordinary habits of men in parting with the conveyance and the title deeds in exchange for a promise to pay or a cheque? Certainly not. The ordinary course is, I do not say not to take a cheque, but not to part with the deeds until the cheque is paid. Therefore, you cannot say, as a general rule, that a person who is authorized to receive money is authorized to take a cheque from a person."² The test resolves itself into an inquiry whether, in the ordinary course of business, it is customary to receive a cheque in payment. If it is, it is not negligent; if it is not, presumptively there is negligence in taking a cheque in payment.⁴

Where goods are consigned to a factor the law raises a contract to account for such as are sold, to pay over the proceeds, and to re-deliver the unsold residue on demand.⁵ If then the

The title of a creditor to a negotiable security given on account of a pre-existing debt, and received by him *bona fide* and without notice of any infirmity of title on the part of the debtor, is indefeasible whether that security be payable at a future time or on demand.

¹ Per Byles, J., *Sweeting v. Pearce*, 7 C. B. (N. S.) 449, at 485, *affd.* 9 C. B. (N. S.) 534; see per Martin, B., at 538; but see per Bovill, C.J., *Bridges v. Garrett*, L. R. 4 C. P. 580, at 588, and per Fry, J., *Pearson v. Scott*, 9 Ch. D. 198, at 207.

² Per Smith, L.J., *Papè v. Westacott* (1894), 1 Q. B. 272, at 281.

³ Per Lindley, L.J., *Papè v. Westacott* (1894), 1 Q. B. at 278. See *Story, Agency*, §§ 98, 202.

⁴ *Russell v. Hankey*, 6 T. R. 12.

⁵ *Topham v. Braddick*, 1 Taunt. 572.

Payment to an agent.

Distinction between duty to collect a debt and duty to hand over a document of title against payment.

Duty to account.

accounts are not rendered within a reasonable time, the factor must bear the costs of a suit instituted to have them taken; and he will not be excused though he shews that he has offered to pay a lump sum which turns out to be sufficient.¹ Moreover, he should be constantly ready with his accounts, and neglect of this duty is a good ground for charging him with interest.² So, too, sometimes it is the factor's duty to take legal proceedings,³ though probably only in those cases where he has a right on his own account to do so.

Duty to insure.

Smith v. Lascelles.

In some circumstances a factor is bound to insure; and default in doing so renders him liable for negligence. The circumstances where the obligation to insure arises are defined by Buller, J., in *Smith v. Lascelles*,⁴ as follows: "It is now settled as clear law, that there are three instances in which an order to insure must be obeyed. First, where a merchant abroad has effects in the hands of his correspondent here, he has a right to expect that he will obey an order to insure, because he is entitled to call his money out of the other's hands when and in what manner he pleases. The second class of cases is, where the merchant abroad has no effects in the hands of his correspondent, yet, if the course of dealing between them is such, that the one has been used to send orders for insurance, and the other to comply with them, the former has a right to expect that his orders for insurance will still be obeyed, unless the latter give him notice to discontinue that course of dealing. Thirdly, if the merchant abroad send bills of lading to his correspondent here, he may ingraft on them an order to insure as the implied condition on which the bills of lading shall be accepted, which the other must obey if he accept them, for it is one entire transaction."⁵

Case added by Story.

To these cases Story⁶ adds a fourth where there is a general usage of trade to insure goods; there the factor is bound to do what is usual, and thus to insure.

Claim of mortgagee on insurance money.

In the case of an insurance, it may be noted in passing that there is no right by which a mortgagee can claim the benefit of a policy underwritten for the mortgagor on the mortgaged property in case of loss by fire; for such a contract is not an incident to the mortgage, but of a personal nature for the benefit of the mortgagor, and to which the mortgagee's claim is no higher than that of any other creditor of the

¹ *Collier v. Dudley*, 1 Turn. & Russ. (Ir. Ch.) 421.

² *Pearse v. Green*, 1 Jac. & Walk. 135.

³ *Curtis v. Barclay*, 5 B. & C. 141, at 148.

⁴ 2 T. R. 187, at 189. See a case in Emerigon, *Traité des Assurances*, vol. i. 144 (in Meredith's translation at 116), of which the facts are set out 2 Kent, Comm. 616.

⁵ *Cp. Corlett v. Gordon*, 3 Camp. 472.

⁶ *Agency*, § 190.

mortgagor. This is noted by Lord King, C., in *Lynch v. Lord King, C. Dalzell*,¹ "These policies are not insurances of the specific things (goods) mentioned to be insured; nor do such insurances attach to the realty, or in any manner go with the same, as incident, by any conveyance or assignment; but they are only special agreements with the persons insured against such loss or damage as they may sustain."² Nevertheless it has been held that an insolvent may insure a house to which his assigns are entitled.³ Further, warehousemen and wharfingers may insure their customers' goods in their hands, and recover the whole value under a policy of goods "held in trust or on commission."⁴

Again, a carrier who insures may recover the whole value of goods lost by fire, even if the owner may be disabled from recovering under the Carriers Act, 1830;⁵ this, however, is subject to the dominant principle in this branch of law, that insurance is no more than an indemnity;⁶ so that what is recovered beyond that amount would be held in trust for the owners of the goods.

As between a common carrier of goods and an underwriter upon them, the liability to the owner for their loss is primarily upon the carrier, while the liability of the insurer is only secondary. The insurer is practically in the position of a surety. Whenever he has indemnified the owner for the loss he is entitled to all the means of indemnity which the satisfied owner

Carrier insuring may recover where owner of goods is disentitled.

Insurer a surety.

¹ 4 Bro. Parl. Cas. 431.

² See per Story, J., *Columbia Insurance Company of Alexandria v. Lawrence*, 10 Peters (U. S.) 507, at 512. A policy of fire insurance is a contract of indemnity, and on payment the insurer is entitled to recover from the assured any sum which he may have received in excess of the loss actually sustained by him: *Darrell v. Tibbitts*, 5 Q. B. D. 560. "A policy," says Blackburn, J., in *Wilson v. Jones*, L. R. 2 Ex. 139, at 150, "is, properly speaking, a contract to indemnify the insured in respect of some interest which he has, against the perils he contemplates it will be liable to, and I know no better definition of an interest in an event than that indicated by *Lawrence, J.*, in *Barclay v. Cousins* (2 East 544), and more fully stated by him in *Lucena v. Craufurd* (2 B. & P. (N. R.) at 301), that if the event happens the party will gain an advantage, if it is frustrated he will suffer a loss." In *Castellain v. Preston*, 11 Q. B. D. 380, a vendor contracted for the sale of a house which was insured against fire, and the contract contained no reference to the insurance. After the date of the contract the house was damaged by fire, and the vendor received the insurance money from the insurers. The purchase being completed without diminution of the purchase money, the insurers were held entitled to recover back a sum equal to the insurance money. See *The Westminster Fire Office v. The Glasgow Provident Investment Society*, 13 App. Cas. 699. Underwriters cannot maintain an action for damage in their own names to the thing insured: *Simpson v. Thompson*, 3 App. Cas. 279. See *ante*, 601, 887 n., 890.

³ *Marks v. Hamilton*, 7 Ex. 323.

⁴ *Waters v. Monarch Insurance Company*, 5 E. & B. 870; *Home Insurance Company v. Baltimore Warehouse Company*, 93 U. S. (3 Otto) 527, *post*, 1002.

⁵ 11 Geo. IV. & 1 Will. IV. c. 68. *London and North-Western Railway Company v. Glyn*, 1 E. & E. 652. In *North British Insurance Company v. Moffatt*, L. R. 7 C. P. 25, the suggestion of Erle, C.J., and Hill, J., in *London and North-Western Railway Company v. Glyn* was adopted.

⁶ *Castellain v. Preston*, 11 Q. B. Div., 380, per Brett, L.J., at 386. See *Lucena v. Craufurd*, per *Lawrence, J.*, 2 B. & P. (N. R.) 269, at 302.

held against the party primarily liable, and an insurer who has paid a loss may use the name of the assured in an action to obtain redress from the carrier whose failure of duty caused the loss.¹ The insurer has, however, no more rights than the assured; and when a bill of lading provided that the carrier when liable for the loss should have the full benefit of any insurance that may have been effected on the goods, the effect of the provision was held to limit the rights of the insurer to recover against the carrier.²

Duty in
insuring.

To return to the factor. If it is his duty from any cause to insure, he thereby becomes bound to make himself acquainted with the nature of the intended transit, and with all the conditions which are usually inserted in policies for such a transit;³ to procure the execution of it within a reasonable time,⁴ and in terms covering the peculiar risks⁵ by solvent underwriters.⁶ Then he will not be chargeable with any loss which may ensue merely because an insurance might elsewhere have been obtained on more favourable terms.⁷ In the event of a loss happening he becomes bound to the exercise of reasonable diligence in recovering the subscriptions.⁸

Reinsurance.

A word may be added as to the obligation on a reinsurer, which is certainly no less than that of an original insurer, being *uberimæ fidei* in both cases. Concealment, in fact, vitiates the policy, even apart from intention to deceive. It is pointed out in *Sun Mutual Insurance Company v. Ocean Insurance Company*,⁹ that the need for full disclosure in the case of reinsurance may be greater than between the parties to the original insurance. "In the former, the party seeking to shift the risk he has taken is bound to communicate his knowledge of the character of the original insured, where such information would be likely to influence the judgment of an underwriter; while in the latter the party, in the language of Bronson, J., in the case of the *New York Bowery Fire Insurance Company v. New York Fire Insur-*

¹ *Hall & Long v. Railroad Companies*, 13 Wall. (U. S.) 367, at 370.

² *Wager v. Providence Insurance Company*, 150 U. S. (43 Davis) 99, at 108.

³ *Mallough v. Barber*, 4 Camp. 150.

⁴ *Turpin v. Bilton*, 5 M. & G. 455.

⁵ *Park v. Hammond*, 6 Taunt. 495.

⁶ *Story, Agency*, § 187.

⁷ *Wake v. Atty*, 4 Taunt. 493; *Maydew v. Forrester*, 5 Taunt. 615.

⁸ 2 *Phillips, Insurance*, 566.

⁹ 107 U. S. (17 Otto) 485, at 510. A double insurance is where the same man is to receive two sums instead of one, or the same sum twice over for the same loss, by reason of his having made two insurances upon the same goods, or the same ship: *Godin v. London Insurance Company*, 1 Burr. 490. Where this is the case there is contribution between the two persons liable to pay, and the assured only can receive indemnity: *North British and Mercantile Insurance Company v. London, Liverpool, and Globe Insurance Company*, 5 Ch. Div. 569; 3 Kent, Comm. (13th ed.), 281.

ance Company,' is 'not bound, nor could it be expected, that he should speak evil of himself.'"¹

The position of an insurance broker² may properly be noticed here. Policies are usually effected through the agency of brokers, who keep running accounts with the parties. The premium as between the underwriter and the assured is considered to have been paid at the time of the subscription; the underwriter acknowledges his receipt of it; and if he does not actually receive it, he accepts the broker for his debtor, and substitutes him for this purpose in the place of the assured. The broker then has in an action the same grounds of defence against the claim for the premium as the assured would have, if he had effected the policy in his own person without the intervention of a broker, except in cases where the assured may be entitled to recover back the premium from the underwriter.⁴ The assured does not, as matter of practice, in the first instance, pay the premium to the broker, nor does the latter pay it to the underwriter. As between the assured and the underwriter the premiums are considered as paid. The underwriter looks to the broker for payment and he to the assured, while the assured pays the premiums to the broker only.⁵

Insurance
broker. His
position.

The insurance broker's duty⁶ is then to negotiate the terms of a policy between the insurers and the assured, and to prepare a memorandum, or in the case of marine risks a slip, embodying the terms agreed on. When this is done his duty is discharged, and without specific instructions he is not entitled in any way to

His duty.

¹ 17 Wend. (N. Y.) 359, at 367.

² For the special practice with regard to discovery of documents in an action on a policy of marine insurance, see *China Steamship Company v. Commercial Assurance Company*, 8 Q. B. Div. 142, where (at 145), Brett, L.J., explains the reason of the rule. As to its limitations, see *Henderson v. The Underwriting and Agency Association (Limited)* (1891), 1 Q. B. 557. The leading case on "insurable interest" is *Lucena v. Craufurd*, 3 B. & P. 75, 2 B. & P. (N. R.) 269, 1 Taunt. 325. If a person be directly liable to loss in the happening of any particular event, as if he be an insurer or be answerable as owner for the negligence of the master, he has an insurable interest, notwithstanding the negligence is the negligence of his servants and in law his own negligence: *Walker v. Maitland*, 5 B. & Ald. 171. See also *Anderson v. Morice*, 1 App. Cas. 713; *Colonial Insurance Company of New Zealand v. Adelaide Marine Insurance Company*, 12 App. Cas. 128; *Wilson v. Jones*, L. R. 2 Ex. 139, at 150, per Blackburn, J. *Ebsworth v. Alliance Marine Insurance Company*, L. R. 8 C. P. 596, considers the insurable interest of a consignee. See as to the division of opinion in this case the note in 6 Rev. R. 723. Bovill, C.J.'s, view seems to be adopted in the United States: *De Forest v. Fulton Fire Insurance Company*, 1 Hall (N. Y.) 84, holding a consignee's insurable interest to be the whole value of the goods. There is a very full note on *Insurable Interest* by Mr. Holmes, 3 Kent, Comm. (12th ed.), 376.

³ For the authority of an insurance broker see *Fisher v. Smith*, 4 App. Cas. 1. If an insurance broker keeps a policy he has effected in his hands, he is bound to use reasonable diligence to procure the underwriters to settle and pay any loss that may happen upon it: *Bousfield v. Creswell*, 2 Camp. 545.

⁴ *Jenkins v. Power*, 6 M. & S. 282.

⁵ Per Bayley, J., *Power v. Butcher*, 10 B. & C. 329, cited by the Lord Chancellor, in *Xenos v. Wickham*, L. R. 2 H. L. 296, at 319.

⁶ 3 Kent, Comm. 286.

affect it, for "it is no part of the ordinary duty or power of a broker to cancel agreements once validly and completely entered into."¹ The broker undertakes a duty to use due care and diligence about securing, making, and completing the insurance.

Insurance slip
not a legal
contract.

The real bargain between the assured and the underwriters takes place when the slip containing the terms of the intended policy is accepted. By virtue of the provisions of 30 & 31 Vict. c. 23, ss. 7-9, the slip, in the case of insurance against marine risks, does not constitute a contract enforceable by law, though it is binding in honour.² It therefore becomes the duty of the brokers to advance the stamp and see that the policy is properly drawn up and the matter concluded within a reasonable time. If when the policy is presented to him the underwriter refuses to sign, there is no mode either at law or in equity to force him to do so. Assuming the broker to have used reasonable diligence he is thereon discharged. If through the negligence of the broker the conclusion of the business has been unreasonably delayed, the broker is responsible for any damage sustained by the delay. This damage may be nothing, as where the risk will still be taken by other underwriters at the same premiums, or may be the whole amount recoverable, if a stamped policy had been executed.³

Ionides v.
Pacific Insur-
ance Company.

Fisher v.
Liverpool
Marine Insur-
ance Company.

In order to prove the case against the broker the slip would have to be put in evidence "for the collateral purpose of shewing that the broker had not used due diligence in bringing the matter to a conclusion within a reasonable time." In *Ionides v. Pacific Insurance Company* it was held that the slip, though void as a contract by 30 & 31 Vict. c. 23, is admissible in evidence for this purpose. From this undisputed law, Blackburn, J., in *Fisher v. Liverpool Marine Insurance Company*,⁴ sought to hold an insurance company liable for breach of duty in not issuing a policy in reasonable time after having undertaken the duty of preparing one.

Blackburn, J.'s
reasoning.

The foundation of the attempt to hold them liable was a difference of usage in the case of private underwriters from that which was admitted to prevail in the case of insurance companies. In the case of an insurance company, after the slip has been initialled by the agent of the company, it is returned by the

¹ *Xenos v. Wickham*, L. R. 2 H. L. 296, at 321.

² *Lishman v. Northern Maritime Insurance Company*, L. R. 8 C. P. 216. But a Lloyd's slip on a risk which is not marine is a binding contract: *Thompson v. Adams*, 23 Q. B. D. 365.

³ Per Blackburn, J., *Fisher v. Liverpool Marine Insurance Company*, L. R. 8 Q. B. 469, at 475, in Ex. Ch. L. R. 9 Q. B. 418.

⁴ L. R. 8 Q. B. 469; L. R. 9 Q. B. 418.

broker of the assured, and a copy of it is then sent to the company by the broker for the purpose of preparing the policy. The policy is then drawn on stamped paper by the company, who themselves advance the stamp and execute the policy ready to be delivered to the assured. Blackburn, J., held the effect of giving the copy slip and the acceptance by the company was that the company took upon themselves what would otherwise be the duty of the broker, viz., to use due skill and diligence about preparing the policy properly, and bringing the transaction as regards the company to a conclusion in a reasonable time; and the mere fact that the company were trusted with the duty, he contended, would be a sufficient consideration. But the majority of the Court held that the true effect of the transaction was that, on the initialling of the slip, an engagement was entered into, not merely to execute a binding policy, but to execute it in accordance with the usual and accustomed course of business, including an undertaking to procure the stamp and fill up the policy; and since no other agreement than that evidenced by the initialling the slip was entered into, the statute applied and prevented an action founded on a supposed breach of duty in not procuring a stamp and preparing a policy. This decision has been acquiesced in ever since.

It is the duty of the insured to communicate all intelligence that he possesses which may affect the mind of the insurer. He is not bound to communicate loose rumours nor facts which the insured may be presumed to know, such as general news accessible in the newspapers. The law requires *uberrima fides*, yet either party may be silent as to grounds common to both.¹

Duty of the insured.

Though we have in terms limited our consideration in the foregoing remarks to the case of factors and brokers—the most ample and responsible classes of agents—the principles applicable are appropriate to all cases of mercantile agency; we are, therefore, dispensed from considering the other cases of agency independently and in detail.²

γ. As to warehousemen.³

¹ Carter v. Boehm, 3 Burr. 1905, 1 Sm. L. C. (9th ed.), 523. Cp. Blackburn v. Vigors, 12 App. Cas. 531.

² It is the duty of a confidential agent to keep regular accounts: White v. Lady Lincoln, 8 Ves. 363. See *In re Lee*, L. R. 4 Ch. 43, where the principle of the earlier case is said to apply only where there is a general agency. The duty of a "commission agent" is explained by Blackburn, J., Ireland v. Livingston, L. R. 5 H. L. 395, at 407; Cassaboglou v. Gibb, 11 Q. B. Div. 797; Boden v. French, 10 C. B. 886. A commission agent is not bound to insure, for the benefit of his principal, goods consigned to him for sale, without some directions, either express or implied, to that effect, though he has such an interest in the goods that he may insure them to their full value in his own name: 3 Kent, Comm. 261, n. (c).

³ See Bell, Princip. of Law of Scotland (9th ed.), 108, where the cases are collected; 2 Parsons, Contracts (6th ed.), 139; 3 Chitty, Commerce and Manufactures, 354-386.

Warehouse
and ware-
houseman—
definitions.

The word warehouse is ambiguous. It may signify any one of three things—(1) A store for goods for safe keeping; (2) a building for storing imported goods on which customs dues have not been paid; (3) a store for the sale of goods wholesale.¹ So, too, warehouseman is an ambiguous term, and may mean either the keeper of a warehouse or the man that works therein. For the present purpose the third meaning of warehouse may be altogether eliminated, and so may special aspects of the second;² our consideration can then be confined to the most general view of a warehouse as a store for goods for safe keeping. The second meaning of warehouseman has reference to the law of master and servant, and may also here be disregarded.

Rule of dili-
gence.

Caillif v.
Danvers.

A warehouseman, restricting the use of the term to its first meaning, is a bailee for reward; and therefore comes under the rule exacting ordinary diligence.³ This is in accordance with the ruling in *Caillif v. Danvers*,⁴ where plaintiff claimed against the defendant, a warehouseman, for negligently keeping a quantity of *ginseng* which had been deposited by the plaintiff in his warehouse. It appeared that the *ginseng* had been destroyed by rats; that several persons had looked at it on different days and every night; that the lid of the box was shut down, though not nailed; and also that many cats were kept in the warehouse, and all possible care was taken to destroy vermin. On this Lord Kenyon said “that a warehouseman was only obliged to exert reasonable diligence in taking care of the things deposited in his warehouse; that he was not, like a carrier, to be considered as an insurer, and liable for all losses happening otherwise than by the act of God or the King’s enemies; and that the defendant in the present case, having exerted all due and common diligence for the preservation of the commodity, was not liable to any action for this damage, which he could not prevent.”

Rule laid down
by Lord
Kenyon, C.J.

Duty of ware-
houseman.

A warehouseman is not answerable for a theft committed by his servants if he can prove that his goods were lodged in a place of safety, and that he has not been guilty of positive negligence, “nor exercised less care towards them than towards his own property.”⁵ This last statement is not quite in accord with the principle we have seen governing in these cases; since it does

¹ Ogilvie, *English Dictionary*, *sub voce* Warehouse.

² As to the Warehousing Acts and the questions raised as to bonded goods and the property therein, with the method of and limitations in transferring it, see 1 Bell, *Comm.* (7th ed.), 199–211; M’Culloch, *Dictionary of Commerce*, art. Warehousing System; 2 Kent, *Comm.* 547, n. (d).

³ Jones, *Bailm.* 96.

⁴ Peake (N. P.) 115. See also *Garside v. The Proprietors of the Trent and Mersey Navigation*, 4 T. R. 581, and compare it with *Hyde v. The Navigation Company from the Trent to the Mersey*, 5 T. R. 389, and *Maving v. Todd*, 1 Stark. (N. P.) 72.

⁵ 3 Chitty, *Commerce and Manufactures*, 368. *Ante*, 901.

not guard against the contingency of the bailee being very careless with his own goods. The more accurate rule is that a warehouseman must take the same care in the preservation of the things bailed to him which a good and prudent business man would take of his own; since this is a contract of mutual benefit to the bailor and bailee.¹ He is bound to warehouse the goods entrusted to him in a place reasonably safe, suitable, and usual.²

The bailor has no right to expect more than ordinary and average care; so that where a building fell from a defect in the foundation, the warehouseman was held not conclusively charged, since such a casualty might befall without negligence on his part; although of course there was presumptive evidence of fault.³

A warehouseman, or storekeeper—as he appears to be called in Scotland—is also bound “to store in a proper manner” the goods he receives; this duty involves the obligation of reasonable inspection and shifting of them from time to time when goods are so packed that damage may result from their too long continuance in one position. Thus the warehouseman was held liable where bags were piled one above another in such circumstances that the pressure, long continued, was likely to cause deterioration in their contents, and where, with knowledge of this likelihood, no steps were taken to prevent it.⁴

It is not of itself sufficient to constitute negligence of the warehouseman that he has departed from his bailor's instructions as to the custody of his goods; for he is not bound to greater care than ordinary care, unless he has accepted the goods on a special condition that he is to take unusual precautions. The fact of a deviation, if not in itself sufficient to make him amenable, is yet a circumstance, and even a material one, in the constitution of negligence, though not sufficient to dispose of the case.⁵

Further, the warehouseman is bound to use due care in storing the goods, and is liable for the acts of his servants only while acting within the scope of their employment.⁶ A good instance of this is given in *Aldrich v. Boston and Worcester Railway Company*,⁷ where, though servants of a warehouseman were present during a

To afford ordinary and average care.

Goods must be properly packed.

Warehouseman not necessarily bound to follow bailor's instructions.

Only liable for servants acting within the scope of authority. *Aldrich v. Boston and Worcester Railway Company*.

¹ *Dolum et custodiam, non etiam casum, cui resisti non potest, venire constat*: Code 4, 65, 28; cp. Code Civil, art. 1528; but see *Finucane v. Small*, 1 Esp. (N. P.) 315, and the comment on it in *Schmidt v. Blood*, 9 Wend. (N. Y.) 268.

² A carrier also a warehouseman who accepts goods for transportation or keeps them after their arrival is not a gratuitous bailee: *White v. Humphery*, 11 Q. B. 43. *Ante*, 47 n. 1, 909, 927.

³ *Wilnot v. Jarvis*, 12 Upp. Can. Q. B. 641. Cp. *Searle v. Laverick*, L. R. 9 Q. B. 122.

⁴ *Snodgrass v. Ritchie*, 17 Rettie 712.

⁵ *Tobin v. Marison*, 5 Moo. P. C. C. 110, per Lord Brougham, at 128.

⁶ *Coleman v. Riches*, 16 C. B. 104.

⁷ 100 Mass. 31.

fire in the night-time at the warehouse, they neglected to remove the plaintiff's goods, who sued for their loss, and grounded his claim on the alleged negligence of the servants. The claim was held not sustainable, since it was no part of the servants' duty to rise in the night to look after the plaintiff's goods, and the mere circumstance that they were present at the fire in their character as citizens could not extend the plaintiff's rights against their employer.

Subsequent
destruction of
goods by
casualty does
not release
from liability
for previous
negligence.

If a total loss has occurred without want of ordinary care and diligence on the part of the warehouseman, though previously to the loss he was guilty of actionable negligence by which the goods were deteriorated, it has been decided in an American case¹ that the subsequent destruction of the goods does not release him from his previously accrued liability for his negligent act. This decision seems sound in principle. If the goods had been destroyed by the negligent act, it is clear that the warehouseman would be liable; and the fact of something happening subsequently to the loss, which had it happened previously to the loss would in all probability have destroyed the goods, should not avail to save the warehouseman from a liability which had already accrued; since in fact they were not so destroyed. Moreover, it is consistent with probability that they might have been sold, removed, or otherwise dealt with. Where, then, there is a partial destruction by negligence, is there any difference in the event of a subsequent accident, without negligence, in which had the goods existed at the time they would have been involved? The answer seems to be that the bailee's obligation to take care is absolute, and is not subject to a saving clause that if the goods, which his negligence has not affected, become lost to their owner through some cause which, if the bailee's negligence had not have intervened, might have destroyed the whole, those, the loss of which his negligence has caused, shall not be debited against him. It seems, too, more in accordance with public policy, if such a consideration is admissible, that the bailor, in the case of negligence by the bailee being established, should have one point more of safety, than that a negligent bailee should have an extra chance of evading responsibility for his broken engagement. The accident, without negligence, may excuse that which happened through its agency; there is no reason why it should be extended to cover that which did not.² Consequently, where a man has contracted to warehouse goods in a certain place, but warehouses them in another, where they are

¹ Powers v. Mitchell, 3 Hill (N.Y.) 545.

² See *post*, Common Carriers 7th exception.

destroyed by fire, without negligence on his part, he is, nevertheless, liable, since he has broken his contract and thus exposed them to injury; and this has been decided in *Lilley v. Doubleday*.¹ The only exception, said Grove, J., citing *Davis v. Garrett*² as his authority, is where the goods must as inevitably have been destroyed at one place as at the other; and he lays down the rule: "If a bailee elects to deal with the property entrusted to him in a way not authorized by the bailor, he takes upon himself the risks of so doing, except where the risk is independent of his acts and inherent in the property itself;" to which Lindley, J., agreed.

Lilley v. Doubleday.

The rule.

These considerations suggest the duty of the warehouseman with regard to attempts to seize goods deposited under colour of legal process. The increased resort of people with valuable securities to Safe Deposit Companies for safe custody of deeds and jewellery renders this a matter of growing importance. It is not doubtful that a bailee for reward may excuse himself for failure to deliver the property to the bailor when called for, by shewing that it was taken out of his custody under the authority of valid legal process,³ of which fact he has given reasonable notice to the owner. But there is a duty on the bailee not to part with property improvidently on a mere allegation of the existence of legal process. He is bound to make all reasonable inquiries into the validity of the allegation before he parts with his bailor's property, and to receive such assurances as would convince a reasonable and intelligent man. An unexceptionable course for the warehouseman to adopt for his own security would be to interplead.⁴

Goods deposited seized under colour of legal process.

If the bailee parts with his bailor's property without sufficient justification or excuse, and is then sued by the owner for a conversion or a negligent loss, it is not a defence or bar to the action to shew that, after the property went into the possession of others, it was levied upon under process against the true owner. If it can be shewn that the bailor became repossessed of the property, or that it came under his control, or that he had the benefit of it by application through regular legal proceedings

No justification or excuse for parting with goods to shew that they were subsequently taken under legal process.

¹ 7 Q. B. D. 510. The principle is the same as that which decides that when a debtor is directed by his creditor to remit money by post and it is lost, the creditor must bear the loss: *Warwicke v. Noakes*, Peake (N.P.) 67; *Dunlop v. Higgins*, 1 H. L. C. 381; *Household Fire, &c. Company v. Grant*, 4 Ex. Div. 216. The ground for discharging the debtor in that case is that he has obeyed the directions of his creditor, while the ground for making him liable in this case is that after undertaking an obligation to the owner of the goods, he did not perform it.

² 6 Bing. 716.

³ *Shelbury v. Scotsford*, Yelv. 22; approved *Ex parte Davies, In re Sadler*, 19 Ch. Div. 86, per Jessel, M.R., at 90.

⁴ *Rothschild v. Morrison*, 24 Q. B. Div. 750. See per Field, J., Glyn, Mills, Currie & Company v. East and West India Dock, 5 Q. B. D. 129, at 135.

upon a judgment against him (*i.e.*, the owner), such facts will go in mitigation of damages.¹ As we have seen, however, in the case of *Powers v. Mitchell*,² the subsequent appropriation by the owner in no way cures the original wrongful act.

Safe Deposit
Companies.

The duty of Safe Deposit Companies is not different in kind from that of other warehousemen, though the preciousness of the securities they hold is likely to call into being the particular danger of liability to legal process more frequently than in the case of bulky goods.

Cailiff v.
Danvers.

A case already cited³ is an authority that for destruction of goods warehoused by rats a warehouseman is not answerable without negligence. Neither is he liable for robbery, accident, or fire, unless in any case there is gross default or negligence. The rule with regard to this is very clearly stated in *Foster v. Essex Bank*,⁴ a decision mentioned with approbation in *Giblin v. McMullen*:⁵ "The principle applicable to this species of bailment goes no further than to make the bailee liable in case of *ordinary neglect*; so that if he shews that he used due care, and nevertheless the goods were stolen, he would be excused. . . . And this is also reasonable, for one who takes goods into his warehouse, to keep for a stipulated price, does not intend to insure them against fire⁶ or thieves. His compensation is only in the nature of rent; or, if anything beyond that, only for the vigilance of a man of common prudence. If he locks and fastens the warehouse, as other prudent people do, and thieves break through and steal, he ought not to be accountable, and if he leave the door or windows open, he ought to be."

Where ware-
houseman has
insured.

North British
Insurance
Company v.
Moffat.

If the warehouseman have insured, he is liable to the owner for money paid and received to his use,⁷ unless the policy is in similar terms to that which formed the subject of the decision in *North British Insurance Company v. Moffat*,⁸ where the insurance by the warehouseman was on "goods in trust or on commission for which they (the assured) are liable." In this particular case, as the property in the teas, the subject of the insurance, had passed to purchasers, and the teas were accordingly at the risk of

¹ *Roberts v. Stuyvesant Safe Deposit Company*, 123 N. Y. 57, 20 Am. St. R. 718.

² 3 Hill (N. Y.) 545, *ante*, 1,000.

³ *Cailiff v. Danvers*, Peake (N. P.) 114.

⁴ 17 Mass. 479, at 502.

⁵ L. R. 2 P. C. 317, at 338.

⁶ For a full consideration of the law where the loss has happened through fire, and as to the burden of proof, see *Lancaster Mills v. Merchants' Cotton-Press Company*, 24 Am. St. R. 586.

⁷ *Sidaways v. Todd*, 2 Stark. (N. P.) 400; *Waters v. Monarch Life and Fire Insurance Company*, 5 E. & B. 870; *London and North-Western Railway Company v. Glyn*, 1 E. & E. 652, *ante* 993. See *Ex parte Bateman*, 8 De G. M. & G. 263.

⁸ L. R. 7 C. P. 25.

the purchasers, as between them and the assured it was held that the teas were not covered by the policy.

In a case¹ where floating policies of insurance were effected by wharfingers against loss by fire on grain and seed, *Jessel, M.R.*, who was confirmed by the Court of Appeal, said:² "By the evidence, a wharfinger, by the custom, I suppose, of the City of London, or, at all events, by the custom of the trade, is in the same position as a common carrier. He is liable, in the absence of express stipulation, for the safe custody of the goods entrusted to his care; and if the goods are destroyed by fire, he is liable in law for breach of duty, in not so carefully attending to the goods that no fire could destroy them. It is no answer on this point to say, 'I was not guilty of negligence,' because it is negligence not to have prevented accident; and for this purpose it is not necessary to shew that he was guilty of actual negligence or actual default; he is liable for not properly taking care of the goods. That being so, a wharfinger makes a charge to his customers of a sum sufficient to remunerate him not only for his expenses, but also for the risks attending his trade, and of course a fair margin of profit. Whether that is charged under the name of wharfage, or lighterage, or consolidated rate, is wholly immaterial for this purpose. It is a charge he makes to his customer, for undertaking those duties and liabilities amongst others."

North British
and Mercantile
Insurance
Company
v. London,
Liverpool, and
Globe Insur-
ance Company.

The responsibility of the warehouseman begins directly the goods are delivered to his custody. Till then they are in the custody of the carman, who is the agent of the person sending them; the moment the warehouseman applies his tackle to them the carman's liability ceases. This is illustrated by a rather hard case, *Thomas v. Day*,³ where an accident happened from the cords of certain packs breaking, after defendant's servant had offered to give slings to the carman to make them more secure while being slung in the crane to the warehouse, which offer was refused. On being raised in the crane the cords of the pack gave way, and the goods fell in the street and were injured. Lord Ellenborough, C.J., laid down the law to be that the defendant was bound to see to the strength of the cords. "If," said he, "slings were necessary, the refusal of the carman, on his declining to use them, will not exempt the warehouseman; he ought to have insisted on the carman's using them; and, if he refused, he should have repudiated those goods, and refused to accept them." Where goods deposited with a warehouseman are pledged, the duty of the warehouseman

Commence-
ment of
responsibility.

Thomas v. Day.

¹ North British and Mercantile Insurance Company v. London, Liverpool, and Globe Insurance Company, 5 Ch. Div. 569.

² *L. c.* at 573.

³ 4 Esp. (N. P.) 262.

is performed if he gets the property into his own possession *before* issuing the receipt setting forth that the property is deliverable to the pledgee, and transfers the possession when demanded to the lawful holder of the receipt. A warehouseman is indeed responsible for the custody of the property, but is not a guarantor of the title to an assignee of the receipt.¹ A warehouseman with whom goods have been deposited is guilty of no conversion by keeping them or restoring them to the person who deposited them with him, though that person turns out to have no authority from the true owner; yet so soon as he assumes to affect the property in them he becomes liable for a conversion.²

Onus.

In cases of negligence by a warehouseman the *onus* of shewing negligence is on the plaintiff, unless there is a total default in delivering or accounting for the goods.³

δ. Closely allied to the business of a warehouseman is that of a *wharfinger*.⁴

Wharfinger.
Wharf—
definition.

A wharf is a sort of quay constructed of wood or stone, on the margin of a roadstead, harbour, or river, alongside of which ships or lighters are brought for the sake of being conveniently loaded or unloaded.⁵

Wharfs either
(a) Legal or
(b) Sufferance.

In England wharfs are of two kinds: (a) *Legal wharfs*—certain wharfs in all seaports appointed by commission from the Court of Exchequer or legalized by Act of Parliament;

¹ Insurance Company v. Kiger, 103 U. S. (13 Otto) 352.

² As to the effect of assignment of warehouseman's receipt, in making the warehouseman bailee to transferee: Hollins v. Fowler, L. R. 7 H. L. 757; Zellner v. Mobley, 20 Am. St. R. 390.

³ Harris v. Packwood, 3 Taunt. 264, with the interpretation of it by Abbott, C.J., in Marsh v. Horne, 5 B. & C. 322. See also Clay v. Willan, 1 H. Bl. 297. If there is a default to account at all, then trover will lie: 2 Salk. 655. In the case of a common carrier, as we shall subsequently see, the case is different: Forward v. Pittard, 1 T. R. 27, per Lord Mansfield, at 33. Some of the American cases require "some affirmative and substantive evidence of carelessness on the part of the defendants"—e.g., Lamb v. Western Railroad Corporation, 89 Mass. 98; Willett v. Rich, 142 Mass. 356, 56 Am. R. 684, where it is said: "we understand the doctrine to be well settled in this commonwealth, that the burden of proof never shifts." Mackenzie v. Cox, 9 C. & P. 632, is the case of a loss of a dog placed with defendant for reward, where no evidence was given on the part of the plaintiff as to the manner in which the dog was lost, "the *onus* being on the defendant to acquit himself, by shewing that he was not in fault with respect to the loss of it." Gurney, B., directed the jury that "even if a person does take goods into his possession for reward, he is not answerable for their loss if he takes reasonable care of them." The liability of a warehouseman for goods placed in a warehouse and delivered under the "second" of the bills of lading without notice of the "first," is considered in the case of Glyn v. The East and West India Dock Company in the Court of Appeal, 6 Q. B. Div. 475, and by Lord Blackburn in the House of Lords, 7 App. Cas. 591, at 612.

⁴ "Story, Bailm. § 451-454, 1 Parsons, Law of Shipping, 220-231; 2 Parsons, Contracts (6th ed.), 143. Angell, Carriers (5th ed.), § 66, treats the obligations of warehousemen, wharfingers, and private carriers for hire as identical. As to their liability for deterioration of goods, see *post*, 1066.

⁵ Ogilvie, English Dictionary, *sub voce* Wharf; also Termes de la Ley; 39 & 40 Vict. c. 36, ss. 39-99; sec. 63 repealed by 42 & 43 Vict. c. 21, s. 14; sec. 48 by 44 & 45 Vict. c. 12, s. 48; see also changes made by 46 & 47 Vict. c. 55, s. 19.

(b) *Sufferance wharfs*—places where certain goods may be landed and shipped by special sufferance granted by the Crown for that purpose.¹

In the earliest times the right to constitute ports,² even to the detriment of those already existing, was in the king; but from the reigns of Elizabeth to Charles II., at various times, Acts of Parliament were passed for issuing commissions to appoint and settle the limits of the ports and lawful places for shipping and discharging goods, and to regulate the charges and rights belonging to them.³ These are the foundation of the rights and privileges which are now exercised.

The occupation of a *warehouseman* is so often carried on in conjunction with that of a wharfinger that to a great extent their businesses are identical. In strictness the wharfinger does not warehouse at all; he merely receives goods at and despatches them from the quay. In so far as he carries on the business of a warehouseman he is amenable to the considerations which apply with regard to them; what they are we have already seen.⁴ In so far as he carries on an independent business in places regulated by Act of Parliament, his case must be the subject of independent treatment.

A wharfinger does not undertake to transport goods himself, and receives no profit on account of transportation; therefore it would seem that the rule of diligence to which he is bound should be that applicable to ordinary bailees for hire—to use the diligence of a prudent owner with a full knowledge of the facts; or, as has been said, the wharfinger “is bound to guard against all *probable* danger; the common carrier against all *possible* danger.” This view has not always been acquiesced in. In *Ross v. Johnson*,⁵

Wharfinger not strictly a warehouseman.

Rule of diligence applicable to wharfingers.

Ross v. Johnson. Lord Mansfield's dictum considered.

¹ *Baker v. Liscoe*, 7 T. R. 171. See *Meyerstein v. Barber*, L. R. 2 C. P. 38, per Willes, J., at 50, for the duty of the wharfinger at a sufferance wharf. As to what are the rights of a master at a port where there is no English warehousing statute in force and no evidence of any law different from that of England: *Mors-le-Blanch v. Wilson*, L. R. 8 C. P. 227. Where the king or a subject have a public wharf to which all persons must come, who come to that port to unlade their goods, either because they are the wharfs only licensed for that purpose or because there is no other wharf in that port, excessive duties for crannage, wharfage, &c., may not be exacted, but the duties must be reasonable; “for now the wharf and crane and other conveniences are affected with a public interest, and they cease to be *juris privati* only”: *Allnutt v. Inglis*, 12 East 527, at 539, per Lord Ellenborough, C.J., citing Lord Hale.

² For the law of ports and harbours, see 2 Chitty, Commerce and Manufactures, 1–32; Bac. Abr. Prerogative (B), 5. The definition of a port is considered in *Hunter v. Northern Marine Insurance Company Limited*, 13 App. Cas. 717, where *The Sailing Ship “Garston” v. Hickie*, 15 Q. B. Div. 580, is discussed. As to a harbour, see per Lord Esher, M.R., *The Queen v. Hannam*, 2 Times L. R. 234.

³ Hale, de Port. Mar. c. 5, inserted in 1 Hargr. Tracts, 60; Bac. Abr. Prerog. (B) 5; 1 Eliz. c. 11; 13 & 14 Car. II. c. 11; 22 Car. II. c. 11, s. 21, the two earlier of which Acts are repealed by 6 Geo. IV. c. 105, which is itself repealed by The Statute Law Revision Act, 1873 (36 & 37 Vict. c. 91).

⁴ *Ante*, 998 *et seqq.*

⁵ 5 Burr. 2827.

for instance, Lord Mansfield is reported as saying: "It is impossible to make a distinction between a wharfinger and a common carrier. They both receive the goods upon a contract. Every case against a carrier is like the same case against a wharfinger." There, however, as Story¹ points out, the sole question was whether *trover* would lie against a carrier when the goods had been lost by his negligence, and not converted by him. During the argument a case was cited of a wharfinger, in which it was held that an action *on the case* and not *trover* was the proper action. Lord Mansfield's language becomes quite consistent and intelligible in this view.

Maving v.
Todd.

In the subsequent *Nisi Prius* case of *Maving v. Todd*,² "Lord Ellenborough was of opinion that the liability of a wharfinger, whilst he has possession of the goods was similar to that of a carrier; and he inquired whether the defendants had any case to the contrary." In that case the defendants united the character of lightermen and wharfingers; the case is moreover reconcilable with the run of the authorities if looked at as deciding that the defendant, having accepted goods to carry for reward, had practically accepted them as carrier, and that his liability was therefore not affected because that he was also wharfinger.³

Opinion of
Story.

Story⁴ is of opinion that "the case of a wharfinger does not, indeed, seem in any respect distinguishable from that of a warehouseman; and it has not, in fact, been distinguished from it in any solemn adjudication. On the other hand, the case of a carrier has always been treated as an excepted case turning upon peculiar principles of public policy. In fact, the case before Lord Ellenborough was decided in favour of the defendants on another point, that of a special contract excluding losses by fire, and therefore, it never called for any revision. If it is to be understood as containing any general proposition, not qualified by the particular circumstances of the case, it is opposed by other and better considered opinions."⁵

Cobban v.
Downe.

Another judgment of Lord Ellenborough's on the duty of a wharfinger may be more unreservedly accepted. In *Cobban v. Downe*⁶—a case where goods were laid on a wharf, and the mate

¹ Bailm. § 451.

² 1 Stark. (N. P.) 72.

³ *Forward v. Pittard*, 1 T. R. 27; *Hyde v. Trent and Mersey Navigation Company*, 5 T. R. 389.

⁴ Bailm. § 452, citing *Sidaways v. Todd*, 2 Stark. (N. P.) 400, and 1 Bell. Com. (5th ed.), 467, and note (6); see 1 Bell, Comm. (7th ed.) 194. In *Harman v. Anderson*, 2 Camp. 243, a warehouseman and a wharfinger are assumed to have identical rights and liabilities as contrasted with a carrier's.

⁵ See the learned note to *Platt v. Hibbard*, 7 Cowen (N.Y.) 497, at 502, on Lord Mansfield's *dictum* considered in the light of English authority.

⁶ 5 Esp. (N. P.) 41; *Selway v. Holloway*, 1 Ld. Raym. 46.

of the ship by which they were to be conveyed was called, and they were delivered to him, but afterwards were lost—Lord Ellenborough is reported to have said: “What the duty of a wharfinger is, is to be measured by the usage and practice of others in similar situations, or his known and professed liability. Every man contracts with the public according to the known and ascertained extent of the trade or business in which he is engaged. The defendant has proved that, by established usage, the goods were delivered by the wharfinger to the mate and crew of the vessel which is to carry them; from which time it has been considered that their responsibility is then at an end. Undoubtedly, where the responsibility of the ship begins, that of the wharfinger ends; and a delivery to the ship creates a liability there; but the delivery must be to an officer or person accredited on board the ship; it cannot be delivered to the crew at random, but the mate is such a recognized officer on board the ship, that delivery to him is a good delivery, and the responsibility of the ship attaches, if the jury believe that the mate received the goods as stated by the defendant’s witnesses.”¹

Lord Ellenborough’s view of a wharfinger’s duties.

In *Leigh v. Smith*,² a very similar case, Best, C.J., followed this ruling with a question whether “the case which has been cited is not a little too narrow.”

Where the question is between buyer and seller, the delivery to the wharfinger must be sufficient to give the buyer his remedy over against the wharfinger before the seller is discharged.³

Where the question is between buyer and seller.

As the liability of the *wharfinger* is not distinguishable from that of a *warehouseman*, since both are bound to take common and reasonable care of the commodity entrusted to them, the wharfinger is not liable for slight neglect, and the reason of the law that affects the carrier does not apply to him. He therefore also comes under the same rule with regard to the *onus* of proof which we have seen to apply in the case of a *warehouseman*, and the plaintiff cannot recover on mere proof of loss of articles entrusted to the bailee, but must give some positive evidence of a want of care in the bailee or his servants.⁴

Liability of wharfinger indistinguishable from that of the warehouseman.

In *Bristol and West of England Bank v. Midland Railway Com-*

Bristol and West of England Bank v. Midland Railway Company.

¹ Cp. D. 4, 9, 1, § 3: *Et sunt quidam in navibus, qui custodiæ gratia navibus præponuntur, ut ναυφύλακες, id est, navium custodes, et dietarii. Si quis igitur ex his receperit, puto in exercitorem dandam actionem; quia is qui eos hujusmodi officio præponit, committi eis permittit; quanquam ipse navicularius vel magister id faciat, quod χειρέμβολος, id est manus immissionem appellant. Sed si hoc non extet, tamen de recepto navicularius tenebitur.*

² 1 C. & P. 638. As to negligence in mooring and stationing vessels at a wharf, see *Wood v. Curling*, 15 M. & W. 626, 16 M. & W. 628.

³ *Buckman v. Levi*, 3 Camp. 414, at 415; *Gibson v. Inglis*, 4 Camp. 72. See the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71) s. 29.

⁴ *Foot v. Storrs*, 2 Barb. (N. Y.) 326. *Ante*, 1004.

Judgment of
Fry, L.J.

pany¹ the question was raised whether the persons entitled to goods from a warehouseman could sue him for negligently parting with the possession when their title had accrued after the wrongful act alleged had been committed. The point had been before the Court of Queen's Bench in *Goodman v. Boycott*,² when Wightman and Blackburn, J.J., differed in opinion, the former holding that the time of the accrual of title was immaterial, the latter being of the opposite opinion, but, as the junior judge, withdrawing his judgment. The view of Wightman, J., was acquiesced in; and a similar view was subsequently taken by Willes, J., in *Short v. Simpson*;³ moreover, a Scotch case, *Pirie v. Warden*,⁴ was decided in the same way. The Court of Appeal approved and followed these cases, and held that it made no difference whether the wrongful act was before or after the accrual of the plaintiff's title. Fry, L.J., expressed his approval as follows: "I think it is reasonable to say that the man who ought to have the goods shall not be allowed to set up a wrongful prior act by which he has made away with the goods. He who ought to produce the goods of the man who has the title to the goods and the property in the goods, cannot discharge himself by saying, 'I have wrongfully made away with them, but that was before the accrual of your title.'"⁵

Duty of warehouseman
issuing receipts for goods
in packages
not open to be
tested.

The duty of a warehouseman issuing receipts for goods in cases, sacks, or barrels, not open to be tested, may be noticed. By giving a receipt he merely expresses that he has received goods packed, bearing the same outward appearance as do cases in which are packed merchandise of the character described in the receipt, and that there is nothing unusual or out of the ordinary way of business in the marks, appearance, signs, labels, or character of the packages differing from that in which goods of the character described in the receipt are usually transported, and that they have been represented to him, and that he believes them to be, as described.⁷

¹ (1891) 2 Q. B. 653.

² (1862) 2 B. & S. 1.

³ L. R. 1 C. P. 248.

⁴ 9 Macph. 523.

⁵ (1891) 2 Q. B., at 663.

⁶ It is pointed out, per Lindley, L.J., that Blackburn, J.'s, difference of opinion turned on a point of pleading, and that his difficulty would have been met if the vendor to the plaintiff had been joined as co-plaintiff: *Bristol and West of England Bank v. Midland Railway Company* (1891), 2 Q. B. 653, at 661. The delivery of the key of the warehouse in which goods sold are deposited, is a delivery sufficient to transfer the property; so is the transfer of them in the warehouseman's or wharfinger's book to the name of some other person: *Chaplin v. Rogers*, 1 East 192, per Lord Kenyon, C.J., at 194; *Harman v. Anderson*, 2 Camp. 243, referring to *Hurry v. Mangles*, 1 Camp. 452. See 11 Rev. R. 707 n. Cp. D. 41, 2, 1, § 21: *vina tradita videri cum claves cellar vinarie emptori tradite fuerint*.

⁷ *Dean v. Driggs*, 137 N. Y. 274, 33 Am. St. R. 721.

Many difficult questions occur, in the case of carriers who also warehouse goods, as to when their liability as carriers ends and that as warehousemen begins—such, for instance, as are discussed in *Bourne v. Gatcliffe*¹ and *Cairns v. Robins*.² In *Mitchell v. Lancashire and Yorkshire Railway Company, Blackburn, J.*,³ states the rule of law under this head to be: “Where a carrier receives goods to carry to their destination with a liability as carrier (except so far as that duty is qualified by exceptions), he may be said to be an insurer. The goods are then to be carried at the risk of the carrier to the end of the journey, and, when they arrive at the station to which they were forwarded, the carrier has then complied with his duty when he has given notice to the consignee of their arrival. And after this notice, and the consignee does not fetch the goods away, and becomes *in mora*, then I think the carrier ceases to incur any liability as carrier, but is subject to the ordinary liability of bailee.” And he adds: “I do not think there has been any case decided to this extent, that because the owner of goods was idle and blameable for leaving them in the carrier’s hands, therefore he as bailee held them under no responsibility whatever.”

Carriers who
are ware-
housemen.

Mitchell v.
Lancashire
and Yorkshire
Railway
Company.

In *Chapman v. Great Western Railway Company*⁴ the question of liability was more fully discussed by Cockburn, C.J. The Chief Justice points out that there must be an interval between the receipt of the goods and their departure, and that this may be of even considerable duration. Again, there is not unfrequently delay between their arrival at their destination and the delivery of them to the consignee, “as, for instance, when goods arrive at night, or late on a Saturday, or where the train consists of a number of trucks which take some time to unload.” In these cases “the goods remain in his [the bailee’s] hands as carrier, and subject him to all the liabilities which attach to the contract of carrier.” “The case, however, becomes altogether changed when the carrier is ready to deliver, and the delay in the delivery is attributable not to the carrier, but to the consignee of the goods. Here again, just as the carrier is entitled to a reasonable time within which to deliver, so the recipient of the goods is entitled to a reasonable time to demand and receive delivery. He cannot be expected to be present to receive delivery of goods which arrive in the night-time, or of which the arrival is uncertain, as of goods coming by sea, or by a goods train, the time of arrival of which is liable to delay. On the other hand, he cannot, for his

Chapman v.
Great Western
Railway
Company.
Judgment of
Cockburn, C.J.

¹ 4 Bing. N. C. 314, 3 M. & G. 643; 11 Cl. & F. 45. *Post*, 1103.

² 8 M. & W. 258. See the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 32.

³ L. R. 10 Q. B. 256, at 260.

⁴ 5 Q. B. D. 278, at 281

own convenience or by his own *laches*, prolong the heavier liability of the carrier beyond a reasonable time. He should know when the goods may be expected to arrive. If he is not otherwise aware of it, it is the business of the consignor to inform him. His ignorance, at all events where the carrier has no means of communicating with him—which was the case in the present instance—cannot avail him in prolonging the liability of the carrier, as such, beyond a reasonable time. When once the consignee is *in mora* by delaying to take away the goods beyond a reasonable time, the obligation of the carrier becomes that of an ordinary bailee, being confined to taking proper care of the goods as a warehouseman; he ceases to be liable in case of accident. What will amount to reasonable time is sometimes a question of difficulty, but as a question of fact, not of law. As such, it must depend on the circumstances of the particular case.”¹

Reasonable
time. *Hick v.*
Rodocanachi.

The question of “reasonable time” was exhaustively dealt with in *Hick v. Rodocanachi*,² a shipping case where the defendants, consignees under a bill of lading, were prevented by a strike of dock labourers from unloading. The bill of lading contained no mention of the time within which the goods were to be unloaded. The time implied by the law was therefore a “reasonable time.” The strike delayed the business for a month. Neither plaintiff nor defendants were in default, each doing the utmost possible for the unloading. The plaintiff, however, sued in respect of the delay. The plaintiff’s contention was that time is to be measured by something which may be measured more or less exactly when the contract is entered into; that reasonable time implies ordinary circumstances.³ The defendants’ contention on the other hand was that reasonable time was to be determined, not by the probabilities at the time of making the contract of what might happen, but by reference to the state of things, as ascertained by the event.⁴ The Court of Appeal adopted this view, and held

¹ The cases of the *prima facie* obligation of the carrier to make an actual delivery to the consignee are carefully collected in Angell, *Law of Carriers* (5th ed.), §§ 301, 304. *Post*, 1099.

² (1891) 2 Q. B. 626, reported in the House of Lords *sub nom.* *Hick v. Raymond & Reid* (1893), App. Cas. 22; *Taylor v. Maclellans*, 19 *Rettie* 10. “The question what is a reasonable time, is a question of fact”: *Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), s. 56.

³ This view was supported by citing *Burmester v. Hodgson*, 2 *Camp.* 488; *Ford v. Cotesworth*, L. R. 4 Q. B. 127, in *Ex. Ch. L. R.* 5 Q. B. 544; *Wright v. New Zealand Shipping Company*, 4 *Ex. D.* 165, considered (1893) App. Cas. 22, at 31.

⁴ “Their authorities were Lord Tenterden, C.J., in *Rogers v. Hunter, M. & M.* 63, defining “reasonable despatch”; Erle, C.J., Byles, and Montague Smith, J.J., in *Taylor v. The Great Northern Railway Company*, L. R. 1 C. P. 385 “reasonable time”; Thesiger, L.J., in *Postlethwaite v. Freeland*, 4 *Ex. Div.* 155, “reasonable diligence”; and Lord Selborne, in *Postlethwaite v. Freeland*, 5 App. Cas. 599, at 608, “reasonable time under the circumstances.” “Reasonable time” in mercantile transactions is not applicable to cases of contracts respecting real property. For the considerations

that as the strike could not be put down to any default on the defendants' part, and since there was no provision for the case in the contract, they could not be held liable for the delay. This decision was upheld in the House of Lords, where it was pointed out¹ that if the terms of the bills of lading had required the discharge to be effected in any particular number of days, it was quite clear that the burden of the delay would have fallen on the defendants; but that the balance of authority was distinctly in favour of the view that "reasonable time" is to be interpreted by existing circumstances, and not by consideration of ordinary circumstances merely.

If the consignee refuses to accept goods, the carrier becomes an "involuntary bailee," and it is to be left to the jury whether, considering all the circumstances, he has "acted with reasonable care."²

Refusal of the consignee to accept.

ε. The consideration of the liability of wharfingers suggests that of dock owners.

Dock-owners.

A dock is a place artificially formed, at the side of a harbour or the bank of a river, for the reception of ships, the entrance of which is generally closed by gates.

Definitions.

There are two kinds of docks—*dry or graving docks* and *wet docks*. The former are used for receiving ships in order to their being inspected and repaired. A ship in a graving dock differs nothing at common law from any other chattel delivered for work and labour to be done upon it, when, as we have seen, ordinary care must be used and ordinary negligence imports liability.

Dry or graving docks.

Wet docks are formed for the purpose of keeping vessels always afloat. One of the chief uses of a wet dock is to keep an uniform level of water, so that the business of loading and unloading ships can be carried on without interruption.³

Wet Docks.

Dock-owners are usually companies, incorporated by royal charter or by Act of Parliament, whose liability must most often be referred to the construction of the powers under which they

applicable, see per Lord Chancellor Manners: *Jessop v. King*, 2 Ball. & B. (Ir. Ch.) 81, at 95; *Edwards v. Carter* (1893), App. Cas. 360. See on the same subject of reasonable time, *Chapman v. Larin*, 4 Can. S. C. R. 349, and the remarks of Lord Blackburn, *Dahl v. Nelson*, 6 App. Cas. 38, at 54.

¹ (1893) App. Cas. 22, per Lord Herschell, C., at 28. The dictum of Lord Blackburn in *Postlethwaite v. Freeland*, 5 App. Cas. 599, that a stipulation that cargo is to be discharged with all despatch according to the custom of the port, is identical with the implied obligation to discharge within a reasonable time, is dissented from by Lord Herschell, C. (1893), App. Cas. at 30.

² *Heugh v. London and North-Western Railway Company*, L. R. 5 Ex. 51, per Kelly, C.B., at 57. As to the duty of wharfingers to retain goods till proper delivery orders are presented to them, see *Carr v. London and North-Western Railway Company*, L. R. 10 C. P. 307.

³ *Ogilvie*, English Dictionary, *sub voce*, Dock; *McCulloch*, Dict. of Commerce, art. Docks.

individually act, or to the general Act, which is of the same description as those applying to gas and water companies.¹

Apart from their special statutory liability, or the liability arising from the terms of their charters, with which here we have no direct concern, there are certain duties and liabilities they come under at common law that must now be enumerated.

Their duties
and liabilities.

A dock company by inviting a ship to enter its dock puts itself in the same position as a shopkeeper who invites a customer to his shop. A shopkeeper is bound to provide reasonable facilities, and to guard against anything in the nature of a concealed danger,² though he does not insure the safety of his customer. The duty of a dock company is treated in all its aspects in the cases of *Mersey Docks and Harbour Board v. Penhallow*³ and *Mersey Docks and Harbour Board v. Gibbs*.⁴ Giving judgment in the former case in the Exchequer Chamber, Williams, J.,⁵ laid down the rule applicable adopting the words of Tindal, C.J., delivering the judgment of the Exchequer Chamber in *Parnaby v. Lancaster Canal Company*:⁶ "The common law in such a case imposes a duty upon the proprietors, not perhaps to repair the canal or absolutely to free it from obstruction, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate it without danger to their lives or property."⁷ Whether the duty laid upon the company is undischarged through negligent ignorance when the means of knowledge are at hand, or the requisite steps are neglected where there is actual knowledge, is immaterial; in both instances the company are fixed with actionable negligence. In the case before the Court a mud bank was suffered to exist in a dock open for the ingress and egress of ships. The duty of the company was not absolutely to prevent the accumulation of mud; it was no more than to use reasonable endeavours to do so, and, if these failed, to take such steps as they could to warn those using the dock to prevent the mud bank becoming a trap for their customers. If, then, the dock is in a suitable condition for the reception of vessels of a small burthen only, the dock company are liable if they permit the navigation of the docks by vessels of larger

Rule laid down
by Tindal, C.J.
in *Parnaby v.*
Lancaster
Canal Com-
pany.

¹ 10 Vict. c. 27 (the Harbours, Docks, and Piers Clauses Act, 1847), amended 25 & 26 Vict. c. 69. s. 5.

² *Indermaur v. Dames*, L. R. 1 C. P. 274, L. R. 2 C. P. 311. *Wright v. Lethbridge*, 63 L. T. 572, is an action against the Port Admiral and other officers of Chatham Dockyard, for damage to a barge through mooring in an unsafe berth pointed out by the foreman of the dockyard. It was held that the maxim *Respondet superior* was not applicable.

³ 7 H. & N. 329.

⁴ L. R. 1 H. L. 93.

⁵ 7 H. & N., at 339.

⁶ 11 A. & E. 223 (Ex. Ch.).

⁷ See *Lax v. Darlington*, 5 Ex. Div. 28. *Ante*, 437.

burden without notice to the public; as in *Thompson v. North-Eastern Railway Company*.¹ A dock, which, when finished, would have been adequate for large vessels, was opened before it was finished, and the large vessel of the plaintiffs, in attempting to get out fully loaded, was seriously injured through the channel not being in a fit state. Hill, J., in the Queen's Bench, expressed the liability of the defendants to be "to take reasonable care that their dock and basin were kept so free from obstruction that those who used them might do so without danger to their property."² In the Exchequer Chamber, this was approved with the addition:³ "In our judgment it does not matter whether the obstruction in the channel had grown up after the dock and basin were opened, or whether the dock and basin were opened before the channel was well cleared. Strangers cannot be supposed to know the state of the dock, and the company who open their dock are bound to take reasonable care to make it safe for navigation by those who use reasonable care in navigating it." The dock-owner's duty, is proportioned to the danger, so that, if an uncommon or unexpected danger arise he must use proportionate efforts to ward off its effects.⁴

Thompson v. North-Eastern Railway Company.

In *Williams v. Swansea Harbour Trustees*,⁵ the trustees of docks, being about to open a new one, issued a notice "to ship-owners, merchants, and others," which contained a statement that "the depth of water on the dock sill was twenty-six and twenty-three feet at the highest spring tides, and fifteen feet at the lowest neaps." On the opening of the dock the plaintiff's ship entered and loaded, but was delayed in passing out because the depth in the entrance channel was only nineteen feet. It was held that the notice was a representation to all the world that there was available access to the dock gates of the depth mentioned, or at all events approximating thereto, and that the plaintiffs were entitled to recover.⁶

Williams v. Swansea Harbour Trustees.

The executive government of New Zealand was held liable in *The Queen v. Williams*⁷ for not removing obstructions in a tidal harbour over which it had the control and management. The case was distinguished from *Lancaster Canal Company v. Parnaby*⁸

The Queen v. Williams.

¹ 2 B. & S. 106; *The Excelsior*, L. R. 2 A. & E. 268.

² 2 B. & S., at 116.

³ 2 B. & S., at 121.

⁴ *Leck v. Maestaer*, 1 Camp. 138.

⁵ 14 C. B. N. S. 845.

⁶ As to the duties of dock-masters, see *Lloyd v. Iron*, 4 F. & F. 1011; *The Excelsior*, L. R. 2 A. & E. 268.

⁷ 9 App. Cas. 418; *The Turkistan*, 13 Rottie 342—a case where the proximate cause of the accident was the insufficiency of the buoys of the Glasgow Harbour Trustees.

⁸ 11 A. & E. 230.

and *Mersey Dock Trustees v. Gibbs*¹ in that there were no harbour dues, and the public had a right to navigate subject to the harbour regulations. The Privy Council were nevertheless of opinion that these differences did not take the case out of the principle of those cases, and held that there was a duty imposed upon the executive government to take reasonable care that vessels using the skaiths and wharfs belonging to the executive government, and which received tonnage and wharfage dues in respect of vessels using them should do so without damage. In the argument it was contended that there is no case of liability of a person in fact ignorant of a danger not on his own premises. The former part of this proposition was demolished by Lord Blackburn's inquiry: "Is not negligent ignorance as bad as knowledge?" As to the latter it was urged that "there is no case which holds a wharfinger liable to make inquiries as to access, nor to search for danger any more than any other owner of premises. This was met by pointing out that the Crown controlled the bed of the river and therefore the danger was on the appellants' premises, and the point is not touched on in the judgment. It however suggests a question of considerable importance which may now be considered.

*Curling v.
Wood.*

The first case dealing with the point is *Curling v. Wood*² in the Exchequer Chamber on writ of error. Defendant, a wharfinger, had placed woodwork by his wharf in the bed of the river over which at certain times of the tide vessels of the size of the plaintiff's could not float. Plaintiff's vessel was moored over the woodwork for the purpose of using the wharf; and the defendant "improperly detained the vessel over the said woodwork for an improper time until the vessel, on the fall of the tide, struck upon the woodwork and was damaged." "Wharfingers in general," said Wilde, C.J., delivering the judgment of the Court,³ "may not be bound to moor safely and securely. But in this case the defendant chooses to moor for profit, and in doing so he negligently and unskilfully does what causes the damage."

*White v.
Phillips.*

Curling v. Wood was not cited in *White v. Phillips*,⁴ where the defendants had erected a "campshed" in the bed of the river by his wharf; the plaintiffs sent a barge to be loaded from a schooner then unloading at the wharf; for the convenience of the schooner the barge was brought alongside the wharf, with the

¹ L. R. 1 H. L. 93.

² (1847) 16 M. & W. 628. In *Att.-Gen. v. Terry*, L. R. 9 Ch. 423, a wharf-owner drove piles into the bed of a river so as to occupy three out of sixty feet available for navigation, and this was held an obstruction independently of any actual obstruction being caused thereby.

³ 16 M. & W. at 632.

⁴ (1864) 33 L. J. C. P. 33.

sanction of the defendants' foreman. As the tide fell the barge canted over on the campshed, of whose existence the plaintiffs' bargeman was ignorant, and was injured. The defendants sought to avoid liability on the ground that they were tenants and occupied with the "campshed" in its existing condition; but, says Erle, C.J.,¹ "it appears to me that a duty was, thereupon, cast on the defendants, either to give notice of the danger arising from the campshed being there in that state, or to have had it repaired and properly constructed. They succeeded to the wharf and, therefore, to the benefit of the campshed." In both of these cases the cause of the injury was under the control of the defendants, and its existence was unknown or imperfectly known to the plaintiffs. The duty on the defendants was therefore clear.

Judgment of
Erle, C.J.

In *The Moorcock*² the plaintiffs' vessel was injured through the uneven nature of the bed of the river where the vessel was moored to discharge at the defendants' wharf. The bed of the river was vested in conservators, and the defendants had no control over it. The case of the plaintiffs first alleged a warranty, that the condition of the bottom was fit and safe, this, however, was negatived by Butt, J.,³ and was not raised in the Court of Appeal. The plaintiffs also contended that the defendants owed them a duty and must be taken to have represented that they had taken reasonable care to ascertain that the bottom of the river at the jetty where the plaintiff's vessel was moored was in such a condition as not to endanger its safety in the ordinary way. This contention Butt, J., affirmed. In the Court of Appeal the point glanced at in *Queen v. Williams*,⁴ that there was no duty on the defendants extending beyond the premises—was strenuously argued. The judgment of Butt, J., was, notwithstanding, upheld, though the distinction between the injury being caused *on* or *off* the premises was recognised by Bowen, L.J.,⁵ who founded himself on the words of Holt, C.J., in *Coggs v. Bernard*,⁶ "it would be unreasonable to charge persons with a trust further than the nature of the thing puts it in their power to perform." He points out that because the law will not imply that the persons who have not the control of the place have taken reasonable care to make it good, it does not follow they are relieved from all responsibility. The Lord Justice then indicates what their responsibility is: "They are on the spot. They must know that the jetty cannot be used unless reasonable care

In the Court
of Appeal.

Judgment of
Bowen, L.J.

¹ *L. c.* at 36.

² 13 P. Div. 157.

³ 14 P. Div. 64, at 70.

⁴ (1889) 14 P. D. 64.

⁵ 9 App. Cas. 418.

⁶ 2 Ld. Raym. 909, at 918.

is taken, if not to make it safe, at all events to see whether it is safe. No one can tell whether reasonable safety has been secured except themselves, and I think if they let out their jetty for use they at all events imply that they have taken reasonable care to see whether the berth, which is the essential part of the use of the jetty, is safe, and if it is not safe, and if they have not taken such reasonable care, it is their duty to warn persons with whom they have dealings that they have not done so."¹

The Calliope.

The Calliope² was decided in the Court of Appeal on the assumption that the facts made the principle of law applicable indistinguishable from that applied in *The Moorcock*. The Calliope was bound by charter party to deliver the cargo as directed by the consignees or their agents, and accordingly was ordered by the defendants to discharge the cargo at their wharf. At this wharf there were two berths, the first alongside the wharf and the second outside the first berth. In the space between the two a ridge of mud had been allowed to accumulate, on which the plaintiffs' vessel struck and was injured. "In *The Moorcock*," said Lord Esher, M.R.,³ "we held that the wharfinger must take reasonable care that the front of his wharf is in a state of safety, or, if it is not, warn persons who have to use it that it is unsafe; it was not necessary to decide that there was a warranty by the wharfinger that the wharf was safe. The present case is, however, stronger than that of *The Moorcock*, because here the ship was bound to go to the defendants' wharf by contract; in the former case the ship could use the wharf if she pleased." Though, in the opinion of Lord Esher, M.R., the case was stronger than that of *The Moorcock*, that learned judge did not limit his decision to the point common to both cases. He says: "Is that duty" (*i.e.* the duty of the wharfinger) "confined to the place close to the wharf? Or is the wharf-owner liable for damage done to a ship by grounding upon a place which is in a dangerous state and over which she must necessarily go to get into the berth at the wharf? In my opinion the duty of the wharfinger extends to that part of the frontage as well as to the actual spot where the ship will finally lie, and his duty is to keep it reasonably safe or to tell those coming to his wharf that it is not safe." On this point Bowen, L.J., carefully guarded himself in *The Moorcock*⁴ by saying: "So far as I am concerned I do not wish it to be understood that I at all consider this is

Judgment of
Lord Esher,
M.R.

¹ *Cp. Casement v. Brown*, 148 U. S. (41 Davis) 615.

² 14 P. Div. 138; (1891) App. Cas. 11. *McCallum v. Odette*, 7 Can. S. C. R. 36, was an action brought by one vessel against another for damage caused by negligently anchoring beside a wharf.

³ 14 P. (Div.) at 140.

⁴ 14 P. Div. at 70.

a case of any duty on the part of the owners of the jetty to see to the access to the jetty being kept clear."

In the House of Lords the decision in *The Calliope* was reversed, on the ground that the decision of the Court of Appeal went on an erroneous view of the facts, and that what was considered in the Court below as an order to go to the wharf in fact afforded information upon which the captain and pilot would have to form their own judgment; ¹ moreover, the assumption made in the Court of Appeal—that "the ship was injured by grounding on the land of the defendants" was one for which the respondents "entirely failed to shew the slightest foundation"; ² while the attribution to the defendants of responsibility for the existence of the ridge arose from a misapprehension of the real state of things as the existence of the ridge was to be regarded as an incident to the natural use of the river by vessels navigating it.

As to the point we are more particularly discussing, the liability for the condition of things outside the premises of the wharfinger, Lord Herschell³ says: "If the obstruction which created the difficulty" "had been caused by some unusual and extraordinary circumstance which those navigating the river would have no right to anticipate, but which would be known to the wharfinger, then I quite agree that some duty on his part would arise towards them, and in the absence of warning, it may be that he would be under some responsibility." But in the case at bar it was pointed out that the pilot was well aware of the inequalities in the river. Lord Herschell, however, called attention to one very forceful consideration that had escaped notice: ⁴ "If on the one hand the condition of the bed of the river may be said to have been a matter peculiarly within the knowledge of the appellants, on the other hand the draught of the vessel, which was of at least as great importance in determining whether the vessel could approach the wharf or not, was peculiarly within the knowledge of the respondents."

Lord
Herschell's
opinion.

Lord Watson also says: ⁵ "I do not doubt that there is a duty incumbent upon wharfingers in the position of the appellants towards vessels which they invite to use their berthage for the purpose of loading from or unloading upon their wharf; they are in a position to see, and are in my opinion bound to use reasonable diligence in ascertaining, whether the berths themselves and the approaches to them are in an ordinary condition of safety for vessels coming to and lying at the wharf. If the approach to the berth is impeded by an unusual obstruction they must either

a Lord Watson's
opinion.

¹ (1891) App. Cas., per Lord Halsbury, C., at 15.

² *L. c.* per Lord Watson, at 23, and per Lord Herschell, at 25.

³ *L. c.* at 28.

⁴ *L. c.* at 29.

⁵ *L. c.* at 23.

remove it, or, if that cannot be done, they must give due notice of it to ships coming there to use their quay."¹

Hibbs v. Ross.

Reference may here be made to *Hibbs v. Ross*.² There a ship was laid up in dock for the winter under the care of a ship-keeper, who removed the hatches from one of the hatchways leading into the hold, into which the plaintiff fell and was injured while lawfully on the ship and in the direct course persons passing across the ship from and to another ship in dock were in the habit of passing. The only point discussed in the case, and in which the Court of Queen's Bench were divided in opinion, was whether the ship's register on which the defendant's name appeared as owner was *prima facie* evidence for the jury from which they might draw the inference that the person in charge of the ship was employed by the defendant. This was decided in the affirmative. A question of a duty to keep the hatchway closed was not raised; probably because the negligence in the particular facts was indubitable.

Caniff v.
Blanchard
Navigation
Company.

As to the general proposition—undisputed in *Hibbs v. Ross*—that there is a duty to keep hatchways closed while a ship is laid up in dock for the winter—it is said emphatically in an American State case,³ that there exists no duty whatever for the owner of a ship lying in port to keep hatchways covered at any time, and much less in winter when the ship is placed in charge of a keeper whose duty is to keep hatchways open for ventilation.⁴ "It would be preposterous," said the Court, "to hold that the owner who places his vessel in charge of a shipkeeper during the time she is out of commission and lying in winter quarters, is charged with the duty of building a railing around the open hatchways or with maintaining a light to indicate danger for the purpose of protecting persons from injury by falling into them." This, in the abstract, seems excellent sense. A duty may, however, be constituted by the custom of that port where the vessel lies to use such precautions;⁵ or

¹ The remarks of the Lord Chancellor at the bottom of 17 and on the first half of 18, seem rather directed to the question of the liability of some previous vessel for making the ridge, than to that of the breach of duty on the part of the wharfinger, in not removing it when near or not apprising those about to use the berth of its existence. It seems perfectly possible, that a vessel using the bed of the river in the natural way, may so affect it as to cause damage to a following vessel, without being liable for it; while yet a wharfinger having a knowledge of the unusual destruction to the use of this berth, would be liable for inviting a ship there without giving warning of what Lord Herschell calls "unusual and extraordinary circumstances." Cp. *Letchford v. Oldham*, 5 Q. B. Div. 538.

² L. R. 1 Q. B. 534.

³ *Caniff v. Blanchard Navigation Company*, 11 Am. St. R. 541, at 545.

⁴ Cp. the English case of *O'Neill v. Everest*, 61 L. J. Q. B. 453, where it was held no part of the defendant's duty to supply a cover for a hatchway. *Ante*, 73.

⁵ In *Loader v. London and East and West India Docks Joint Committee*, 65 L. T. 674, the work in question was only "usually performed"; the case negatives any such practice as amounts to the holding out of an inducement. In *The Hornet* (1892), P. 361, it was laid down, distinguishing *The Scotia*, 6 Asp. M. L. C. 541, that there is no duty

the place a vessel occupies may be conceded subject to a right of way being allowed over it; and then if the user of the way is a right as distinguished from a mere permission it must not be kept in a condition unnecessarily dangerous.

In *Gray v. Thomson*,¹ a Scotch case, by the rules of the port of Glasgow, where the ship lay whose condition was the cause of the accident sued on, there was an obligation on those responsible for ships in the position the defenders' vessel occupied, to keep hatchways protected at night; and the question was raised to what extent a deflection from the absolute obligation to afford this security was allowable when special exigencies required work at the hatchways to be done during the night. In the circumstances the shipowner was held not liable; the case, however, may serve to illustrate the obligation imposed by the rules of a port.

Dock companies are also warehousemen and wharfingers; and in so far as they act in either of these capacities they are subject to the law appropriate to that capacity which at the time they exercise.

Dock companies acting as warehousemen and wharfingers.

ζ. Here, too, must be noticed the class of *forwarding agents*.

Forwarding agents.

Forwarding agents are a class of business men who store and forward goods by other agencies than their own, and receive a commission for their trouble in storing goods and in selecting carrying agencies for them.² In so far as they store goods, they are mere warehousemen; in so far as they forward them, they are ordinary agents.³

Forwarding agents are liable for ordinary negligence, and bound to ordinary diligence, and to that only.⁴ Many attempts, says Brett, J.,⁵ have been made to introduce within the exceptional liability of common carriers other trades, as those of

Their duty.

in law on the owner of a barge to have a man on board of her when moored in a dock. As to duty of those on board a ship within the jurisdiction of a harbour-master, to conform to the directions of the harbour-master, even when those directions are probably erroneous: see *Reney v. Magistrates of Kirkcudbright* (1892), App. Cas. 264.

¹ 17 Rettie 200. In *Forsyth v. Ramage*, 18 Rettie 21, there was held to be no duty to fence the unfinished portions of buildings or vessels in course of construction, so that where a man engaged on a ship that was building, fell down a manhole in the engine-room, he was held disentitled to recover. This case was distinguished in *Jamieson v. Russell*, 19 Rettie 898, on the ground that the tank into which the deceased fell, was at other times usually covered and lighted, whereas on the occasion of the accident, it was neither covered nor lighted. The Lord President (Robertson) who had succeeded Lord President Inglis between the time of the decision of the two cases, intimated that, in his opinion, *Forsyth v. Ramage* was wrongly decided. Lord McLaren dissented from the decision in *Jamieson v. Russell*. *Forsyth v. Ramage* was decided on the ground of "the impossibility of fencing consistently with the progress of the work of completing the ship." *Ante*, 743, 768, 844.

² Wharton, *Negligence* (2nd ed.), § 703. *Aldridge v. Great Western Railway Company*, 15 C. B. N. S. 582, see conclusion of judgment of Williams, J., at 599.

³ *Roberts v. Turner*, 12 Johns. (Sup. Ct. N. Y.) 232.

⁴ 2 Kent, Comm. 591; Story, *Bailm.* § 444; Wharton, *Negligence* (2nd ed.), § 703; *Alabama, &c. Railroad Company v. Thomas*, 18 Am. St. R. 119.

⁵ *Nugent v. Smith*, 1 C. P. D. 19, at 31.

wharfingers, forwarding agents, carters, &c., "but all such attempts have failed, because those trades, although, in respect of their being public or common trades, they are similar to the trade of common carrier, are not similar to it in those respects in which it was similar to the trades of shipmasters and inn-keepers." One of the first duties of forwarding agents as consignees for transmission undoubtedly is to obey the instructions of the consignor, either express or fairly implied. If they vary from these, and a loss is thereby occasioned, they are liable to the owners of the goods.¹

Shortly, it may be said that a forwarder's duty and responsibility is of the same character as that of a private carrier—that is, a bailee for compensation.²

VI. CARRIERS FOR HIRE.

Carriers for reward who are not common carriers.

We have already, when discussing the subject of mandates, considered the obligation imposed on a carrier without hire—which we have seen to consist in the bringing to bear slight diligence, and the liability for gross negligence merely.³ We are now to consider the liability of carriers for reward who are not common carriers.⁴ This is a branch of the bailment of hiring—*locatio-conductio*—which is called *locatio operis mercium vehendarum*.

Distinction between a carrier and a common carrier.

The distinction between a carrier and a common carrier is the distinction between carrying under a special contract and carrying as a business.⁵ A private person may contract with another for the carriage of his goods, and incur no responsibility thereby beyond that of an ordinary bailee for hire—that is, the responsibility of ordinary diligence; but where persons hold themselves out as exercising the public employment of carrying goods for people generally, and as ready to engage in the carriage of goods for hire, and not as a mere casual occupation, then they are common carriers.⁶

Definition.

Angell's definition of a private carrier for hire is a negative one: "Any person carrying for hire who does not come within the definition and explanation to be given of a common carrier is a private carrier."⁷ His definition and explanation of a common carrier are taken from *Gisbourn v. Hurst*.⁸ A person to whom

Gisbourn v. Hurst.

¹ Angell, Carriers (5th ed.), § 75.

² Redfield, Carriers, § 3. See *Sutton v. Ciceri*, 15 App. Cas. 144, for the proposition that the exception of insurance risks did not discharge the defenders from their liabilities as ordinary carriers.

³ *Ante*, 891. Angell, Carriers (5th ed.), §§ 17-44.

⁴ Angell, Carriers (5th ed.), §§ 45-59.

⁵ *Satterlee v. Groat*, 1 Wend. (N. Y.) 272.

⁶ *Beckman v. Spouse*, 5 Rawle (Pa.) 179, at 182.

⁷ Angell, Carriers (5th ed.), § 46.

⁸ 1 Salk. (N. P.) 249. In *Fish v. Chapman*, 2 Kelly (Ga.) 353, there is a discussion

goods had been entrusted carried cheese to London, and usually loaded on his return voyage with goods for a reasonable price for all persons indifferently. The Court held that "such an undertaking to carry for hire as this privilege was to be considered as that of a common carrier, and the goods so delivered for that time under legal protection, and privileged from distress, and so wherever they are delivered to a person exercising any public trade or employment." From this we may extract a definition that any person undertaking for hire to carry the goods of all persons indifferently is to be considered a common carrier.

Difficulties, however, occur in estimating the effect of the facts towards determining in individual cases whether a man is a private carrier for hire or a common carrier. Thus, in *Brind v. Dale*¹ the defendant was the owner of thirty or forty carts which were in the habit of standing near the wharfs on the Thames ready to be hired by any person who chose to engage them, either by the hour, day, or job. The defendant's business was that of "a town carman" who let out carts for hire; while it was contended that a common carrier is one who, for hire and reward, takes goods from town to town, and who is by law bound to take any goods offered to him to carry if his cart is not full. Lord Abinger was of opinion that defendant was not a common carrier.

On this Story says:² "It is very difficult to distinguish between the case of a carman and that of a hoyman, or lighter-man, or bargeman plying between different parts of the same town, or taking jobs by the hour or the day. And yet it does not seem to have been doubted that such hoymen, lightermen, and bargemen are common carriers. See *Lyon v. Mells*, 5 East 439. What substantial distinction is there, in the case of parties who ply for hire in the carriage of goods for all persons indifferently, whether goods are carried from one town to another or from one place to another within the same town? Is there any substantial difference whether the parties have fixed termini of their business or not, if they hold themselves out as ready and willing to carry goods for any person whatsoever to or from any places in the same town or in different towns? Is a ship engaged in general freighting business or let out generally for hire for any voyage which the freighter may require less a common carrier than a regular packet ship which plies between different ports?"³

of the definition by Nisbit, J., set out in Story, *Bailm.* (8th ed.) § 495 n. 3. See Serjeant Williams's argument in *Robinson v. Dunmore*, 2 B. & P. 416.

¹ 8 C. & P. 207.

² *Bailm.* § 496, n. 3; with whose opinion Kent, 2 Comm. 598, n. (p), coincides.

³ For this view he cites: *Rich v. Kneeland*, 2 Cro. (Jac.) 330; 1 Roll. Abr. Action sur le Case (C), pl. 1-4; *Wardell v. Mourillyan*, 2 Esp. (N. P.) 693; 1 Bell, Comm. (5th ed.), 467, 468; *Whalley v. Wray*, 3 Esp. (N. P.) 74; *Muddle v. Stride*, 9 C. & P. 380; and some American cases.

Ingate v.
Christie.

In *Ingate v. Christie*¹ the defendant had a counting-house, with his name and the word "lighterman" on the door-posts of it, and carried goods in his lighters from the wharfs to the ships for anybody who employed him, and was a lighterman, and not a wharfinger. Alderson, B., referring to the passage just quoted, said: "Mr. Justice Story is a great authority, and if we would adhere to principle the law would be what it ought to be—a science. There may be cases on all sides, but I adhere to principle if I can." His statement of principle was as follows:

Alderson, B.'s
test.

"The criterion is, whether he carries for particular persons only, or whether he carries for every one. If a man holds himself out to do it for every one who asks him, he is a common carrier; but if he does not do it for every one, but carries for you and me only, that is matter of special contract. Here we have a person with a counting-house, "lighterman" painted at his door, and he offers to carry for every one."

Brind v. Dale.

The facts in *Brind v. Dale*,² however, justify the distinction taken by Lord Abinger, whose ruling is not inconsistent with the principle laid down by Alderson, B.; for it was proved that the driver said to the plaintiff at the time of the hiring, "Don't you leave me; I cannot leave the horses to look after the goods." And the plaintiff said, "I shall go along with you to look after the goods," which would constitute a special contract. If, then, the plaintiff did not accompany the goods, he was guilty of negligence himself; of which he would not be permitted to take advantage. Further, the reporter does not put the general proposition any higher than a *semble*, that a town carman, whose carts ply for hire near the wharfs, and who lets them by the hour, day, or job, is not a common carrier.

Liver Alkali
Company v.
Johnson.

The case of *Liver Alkali Company v. Johnson*,³ points the same way; for there Blackburn, J., speaking of *Ingate v. Christie*, says it is "in express conformity with what appears to have been Lord Ellenborough's view in *Lyon v. Mells*,⁴ and no English authority has been cited in conflict with the doctrine;" while of *Brind v. Dale*⁵ he says, Lord Abinger "reserved the point; and, as the jury found in favour of the defendant on the question whether the goods were received by him as a common carrier, it was never reviewed in *banc*."

The *Liver Alkali Company v. Johnson* does not definitively lay

¹ 3 C. & K. 61.

² 8 C. & P. 207.

³ L. R. 9 Ex. 338 (Ex. Ch.), *post*, 1053. Cp. *Scaife v. Farrant*, L. R. 10 Ex. 358, (Ex. Ch.), distinguished as a special contract.

⁴ 5 East 428.

⁵ 2 Moo. & Rob. 80; 8 C. & P. 207. See per Brett, J., in *Nugent v. Smith*, 1 C. P. D. 19, at 26.

down that one who has carriages for hire is a common carrier, from the necessity of his position, nor yet that without being a common carrier he has the liabilities of one; for the case may be explained by the particular findings; yet it undoubtedly raises a strong presumption that in the opinion of the Exchequer Chamber as then constituted, such, had it been necessary to decide the point, was their view of the law.¹

Alderson, B.'s, distinction between goods carried for every one and goods carried occasionally and specially, may then be taken as indicating the dividing line between private carriers for hire and common carriers. Distinction of Alderson, B., adopted.

On the liability of the private carrier for hire, Holt, C.J.,² says: "He is only to do the best he can. And if he be robbed, &c., it is a good account." He gives the reason for dealing with a bailee of this class differently from the mode of dealing with a common carrier, because "it would be unreasonable to charge him with a trust further than the nature of the thing puts it in his power to perform it. But it is allowed in the other cases by reason of the necessity of the thing." The law was thus laid down by Lord Abinger, C.B., in the case already referred to:³ "I take it that if a man agrees to carry goods for hire, although not a common carrier, he thereby agrees to make good losses arising from the negligence of his own servants, although he would not be liable for losses by thieves or by any taking by force." The ordinary diligence to which a private carrier for hire is bound, is such diligence as a prudent man commonly takes of his own goods, and ordinary negligence is the lack of such care. Duty of private carriers for hire.

We have in another connection⁴ considered the distinction in the civil law between a robbery by force and a secret theft: *Adversus latrones parum prodest custodia; adversus furem prod-esse potest si quis advigilet.*⁵ The conclusion there reached is that the bailee is put to proof to shew that the loss does not arise from negligence,⁶ if the nature of the bailment is such that want of negligence discharges from liability; of course, if he is a common carrier, that is, an insurer, the bailee is in any event liable, provided Theft and Robbery.

¹ See Brett, J.'s, exposition of the meaning of "common" in the phrase common carrier: *Liver Alkali Company v. Johnson*, L. R. 9 Ex. 338, at 343.

² *Coggs v. Bernard*, 2 Ld. Raym. 909 at 918, 1 Sm. L. C. (9th ed.), 201, at 216.

³ *Brind v. Dale*, 8 C. & P. 207, at 211.

⁴ *Ante*, 901.

⁵ Cited *Jones, Bailm.* 44.

⁶ See *Verner v. Sweitzer*, 32 Pa. St. 208. *Clarke v. Spence*, 10 Watts (Pa.) 335, per Rogers, J.: "All the bailor has to do in the first instance is to prove the contract and the delivery of the goods, and this throws the burden of proof that they were lost, and the manner they were lost, on the bailee, of which we have a right to require very plain proofs." *Pitlock v. Wells*, 109 Mass. 452, was decided on the ground that there was only "an involuntary or gratuitous bailment." The decision is easier to account for on this ground than the way in which the facts were looked at to bear it out.

he has not contracted himself out of his liability in distinct terms. The rule of construction in this last case has been declared to be, that "words of general exemption from liability are only intended (unless the words are clear) to relieve the carrier from liability where there has been no misconduct or default on his part or that of his servants. The exceptions in a bill of lading are not intended to excuse the carrier from the obligation of bringing due skill and care on the part of himself and his servants to bear both upon the stowing and the carrying of the cargo. Even in cases within the exceptions the shipowner is not protected if default or negligence on his part or that of his servant has contributed to the loss. . . . It is the duty of the shipowner by himself and his servants to do all he can to avoid the excepted perils; the exception, in other words, limits the liability, not the duty."¹

Return of
property in a
damaged
condition.

A distinction may be suggested in the case where a private carrier delivers the goods in a damaged condition. If the kind of damage done is most often the effect of the carriage, or of the conditions through which the goods must pass in the circumstances of the carriage, it would seem that the bailor should shew that the damage arose from want of ordinary care, before liability is affixed; if the damage is not apparently a natural result of the circumstances in which the contract has been carried out, then the law will authorize a presumption of negligence. Again, if damage done is not the self-evident and natural consequence of usage, and the bailee refuses to give any account of how the damage happened, much more should a presumption of negligence be raised.² Story³ inclines to deny this. He is of opinion that even total loss raises no presumption of negligence in itself. In England the test would probably be to inquire who would be entitled to succeed if no evidence were given. In the case of an absolute loss this would be the bailor; because the obligation is to deliver at some time, somehow fixed; and when that time has arrived, and default is made, it is for the bailee to excuse the default. The possibility of applying this test may depend on the way in which the pleadings are framed. If the pleader frames his case on negligence, as is most usually done, instead of on the mere breach of the contract to deliver, then he would be bound to give evidence sufficient to sustain the view that he has put forward, and could not put the defendant to explain as he would if mere non-delivery were alleged. In the case of deterioration accounted for by the circumstances of the bailment,

Test
applicable.

¹ Per Bowen, L.J., *Steinman & Company v. Angier Line* (1891), 1 Q. B. 619, at 623.

² See, *ante*, 903, 932.

³ *Bailm.* §§ 410, 454, 525.

the state of things speaks for itself, and, to make out a case, something of neglect must be shewn; still where the condition of the thing entrusted to the carrier is depreciated to a degree out of proportion to the conditions of the contract, apparently the bailee is in default. It is for him to shew that he is not; and, therefore, the *onus* lies upon him to discharge the presumption of negligence raised by appearances.¹ The considerations operative in this case, of course, apply to all those classes of bailment where the delivery of the thing bailed is for the mutual benefit of bailor and bailee.

Deterioration
consequent on
the bailment.

Onus.

The private carrier for hire does not undertake any responsibility for loss arising from the ordinary deterioration of goods from their inherent infirmity and tendency to decay. He is bound, notwithstanding, to take all reasonable care when he knows that he has perishable goods in his custody; and it has even been held that he is bound to have them aired and ventilated, if these are usual and reasonable things to do in the circumstances.²

Deterioration
of goods from
inherent
infirmity.

We have been hitherto speaking merely of the normal obligations of the private carrier. His liability may, it is obvious, be varied indefinitely by the terms of the contract into which he enters. A mere carrying by a person who does not hold himself out to carry for people in general will, of itself, without special terms, import the obligations that have been enumerated. Though not a common carrier, a man may yet put himself in the position of a common carrier by the obligation he specially binds himself to; as in *Robinson v. Dunmore*,³ where, on the plaintiff observing to the defendant, who was to carry goods for him, that the tarpaulin of the cart in which he purposed to put them was too small, defendant replied, "I will warrant the goods shall go safe." The goods were injured by rain. Lord Eldon, C.J., directed a verdict for the plaintiff, as by his warranty the defendant had put himself in the position of a common carrier; on motion this direction was sustained.

Obligations
may be varied
by contract.

*Robinson v.
Dunmore.*

Warranty
fixes carrier
for hire with
liability of a
common
carrier.

In the view of Brett, J.,⁴ by a special custom of the realm, all shipowners are equally liable for loss by inevitable accident, whether they are common carriers or private carriers for hire; but

Brett, J.'s,
view of a
special custom
constituting
shipowners
insurers.

¹ The subject is discussed in a note to 2 *Parsons, Contracts* (6th ed.), 125.

² *The Brig Collenberg*, 1 *Black (U.S.)*, 170. *Post*, 1066.

³ 2 *B. & P.* 416.

⁴ *Liver Alkali Company v. Johnson*, L. R. 9 Ex. 338, at 343; repeated *Nugent v. Smith*, 1 C. P. D. 19, at 33, but disented from by Cockburn, C.J., *Nugent v. Smith*, 1 C. P. Div. at 433. Mellish, L.J., declined to express any opinion on the subject. Cockburn, C.J., points out that the majority of the Exchequer Chamber in *Liver Alkali Company v. Johnson*, did not adopt Brett, J.'s, views. See, too, *Story, Bailm.* §§ 501, 504; *Holmes, The Common Law*, 180.

this is by no means established law; indeed, the weight of authority seems considerably to preponderate against it.

VII. INNKEEPERS.

Innkeepers.
Definitions of
an inn by
Abbott, C.J.

In *Thomson v. Lacy*¹ each of the three judges essayed to define an inn. Abbott, C.J.'s, was:² a house where the keeper "furnishes beds and provisions to persons in certain stations of life, who may think fit to apply for them," or "who furnishes every accommodation to all persons for a night or longer;" Bayley, J.'s:³ "a house where the traveller is furnished with everything which he has occasion for whilst upon his way;" and Best, J.'s:⁴ "an inn is a house, the owner of which holds out that he will receive all travellers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received."

Bayley, J.

Best, J.

Criticized.

It would not be difficult to shew that these definitions, as definitions, are very unsatisfactory both from excess and defect. The first, for example, would include a workhouse; nothing less than a mammoth store would come up to the second; and the lessee of a theatre might very well make the profession required in the third.

Bacon's
definition.

Bacon's definition of an innkeeper may, perhaps, better serve :—

¹ 3 B. & Ald. 283.

² L. c. at 285.

³ L. c. at 286.

⁴ L. c. at 287.

⁵ *Abr. Inns and Innkeeper*, (B). At common law any person might keep a tavern and sell liquors previously to 7 Edw. VI. c. 5, which Act first limited the price of wines, secondly, restrained persons from selling wines, and, thirdly, restrained the number of vintners, per Hale, C.B.: *Stevens v. Duckworth*, Hard. 338, at 344, referring to 18 Edw. II. *de visu Franci Pledgii*, art. 28, "Of such as continually haunt Taverns and no man knoweth whereon they do live." See the conclusion of n. (a), 2 Kent, Comm. 597, referring to *The State v. Chambliss*, 1 Cheves (S.C.) 200, as a case where the subject of inns and taverns was elaborately discussed. A tavern, it there appears, originally was a place where the keeper sold wine alone; then food and lodging was afforded for wayfarers. The term tavern came to be synonymous with that of inn as far back as the reign of Elizabeth. The Act 2 Jac. I. c. 9, recites "the ancient, true, and principal use of inns . . . was for the receipt, relief, and lodging of wayfaring people travelling from place to place, and for such supply of the wants of such people as are not able by greater quantities to make their provision of victuals, and not meant for entertainment and harbouring of lewd and idle people, to spend and consume their money and their time in lewd and drunken manner." Cp. also 4 Jac. I. c. 5, "An Act for repressing the odious and loathsome Sin of Drunkenness." In *Rex v. Collins* (21 Jac. I.), Palm. 337, at 374, the erecting a common inn without any licence was held lawful unless it was *ad commune nocumentum*, and to this end it was necessary to allege that it is in an unfit place, or that by reason of the great number of inns in the same place it is burthensome, or the harbour of thieves and of bad characters; and in *Sir Giles Mompesson's case* it is said to have been resolved that a man may erect an inn without any licence from the king because it is only a trade, Vin. *Abr. Inns* (A), Who may erect an Inn. Viner is a translation of Roll. *Abr. Inns* (A), *Que poet erecter un Inne*. Nevertheless in 1 Bulst. 109 (9 Jac. I.) Croke, J., is reported as saying: "No person is to erect an inn without licence from the king;" but in 22 Jac. I. at a conference of the judges at Serjeant's Inn, reported Hutton, 99, it was resolved "that any one may erect an inn for lodging of travellers, without any allowance

"A person who makes it his business to entertain travellers and passengers, and provide lodging and necessaries for them and their horses and attendants, is a common innkeeper;" from which it would follow that the place which the innkeeper occupies for his business of providing lodging and necessaries for travellers and passengers, and their reasonable or necessary accompaniments, is an *inn*.

A coffee-house is not an inn,¹ nor is a boarding-house,² nor a refreshment bar,³ nor an eating-house,⁴ nor a lodging-house, nor a place where select persons are entertained for a short season of the year.⁵ On the other hand, "a man," says Parke, B.,⁶ "may or licence, as well as any one before the statute of 2 Ed. VI. (7 Ed. VI. c. 5) might have kept a common alehouse, or as at this day (19th June 1623) one may set up to keep hackney horses or coaches, to be hired by such as will use them; and all men may convert barley into malt until they be restrained by the Act of Parliament made for that purpose. And as all men may set up trades not restrained by the Act of 5 Eliz. which directeth, no man that hath not been bound, or served as an apprentice by the space of seven years, or by restraint of setting up trades in corporations, by such as be not free, by the like reason all men may use the trade of innkeeping, unless it could be brought to be within the statute of 2 Ed. VI. (7 Ed. VI. c. 5), which hath never been taken to be subject to that statute in point of licence." See Holinshed, Chronicle, (ed. 1586), bk. 1 ch. 16. Of our innes and thorowfares. In *Cromwell v. Stephens*, 2 Daly (N. Y. C. P.) 15, the meaning of the terms "inn" and "hotel," "guest" and "lodger," are carefully examined and defined by Daly, C.J. In a boarding-house, it is said by the same learned judge, the guest is under an express contract at a certain rate for a certain time, while in an inn there is no express engagement, the guest being on his way is entertained from day to day according to his business upon an implied contract. In 2 Parsons, Contracts (6th ed.), 151, "guest" and "boarder" are thus contrasted: "The guest comes without any bargain for time, remains without one, and may go when he pleases, paying only for the actual entertainment he receives; and it is not enough to make a boarder and not a guest that he has staid a long time in the inn in this way."

¹ *Doe d. Pitt v. Laming*, 4 Camp. 73, per Lord Ellenborough, C.J., at 77. A "coffee palace" was held an inn, *Miller v. Federal Coffee Palace*, 15 Vict. L. R. 30.

² *Dansey v. Richardson*, 3 E. & B. 144. In this case the Queen's Bench were divided as to the propriety of Erle, J., asking the jury whether they were of opinion that the loss for which the action was brought was through the negligence of a servant, and, if they were, then was the employer guilty of negligence in engaging the servant? Wightman, J., thought him right, and Erle, J., adhered to his view taken at the trial; but Coleridge, J., and Lord Campbell, C.J., thought no distinction should be drawn between the act of the servant and the act of the defendant, and that the question was wrongly framed. In *Holder v. Soulby*, 8 C. B. N. S. 254, however, the Court of Common Pleas held that there is no liability on the part of a lodging-house keeper to answer for the loss of a lodger's goods where there is mere absence of care and no misfeasance.

³ *The Queen v. Rymer*, 2 Q. B. D. 136; *Carpenter v. Taylor*, 1 Holt (N. P.) 193.

⁴ *Pullman Palace Company v. Lowe*, 26 Am. St. R. 325.

⁵ *Parkhurst v. Foster*, 1 Ld. Raym. 479; *Holder v. Soulby*, 8 C. B. N. S. 254; *Uitzen v. Nicols* (1894), 1 Q. B. 92; where the liability of a restaurant-keeper for the loss of a coat stolen while plaintiff was dining, and which had been taken by a waiter from the plaintiff on his entry and hung on a peg, was said in argument to bear a strong analogy to the liability of a railway company for small luggage delivered to a porter: *Richards v. London, Brighton, and South Coast Railway Company*, 7 C. B. 839; *Great Western Railway Company v. Bunch*, 13 App. Cas. 31. By the Innkeepers' Liability Act, 1863 (26 & 27 Vict. c. 41), s. 4, inn shall mean any hotel, inn, tavern, public-house, or other place of refreshment the keeper of which is now by law responsible for the goods and property of his guests, and the word innkeeper shall mean the keeper of any such place. But in *Dixon v. Birch*, L. R. 8 Ex. 135, it was held that the manager of an hotel belonging to a company is not an innkeeper, and that the company itself must be sued. *Si un hoste invite un al supper, et le nuit esteant farr spent il luy invite a*

⁶ *Johnson v. Midland Railway Company*, 4 Ex. 367, at 371.

keep an inn for those persons only who come in their own carriages," and again, "if he has only a stable for a horse he is not bound to receive a carriage."¹ Though there is an obligation on the innkeeper to admit and entertain to the extent of his accommodation all persons of the class for whose entertainment he holds out his house and against whom no reasonable objection can be shewn, yet he may exclude such as are not sober or orderly or who are not able to pay his reasonable charges; and he is under no obligation to admit, and has the power to prohibit, the entrance into his house of any person or class of persons for the purpose of plying his guests with solicitations for patronage in their business. Moreover, he may afford the means of supplying the requirements of his guests on his premises, outside his business as innkeeper, as, for example, by establishing a news stand or a barber's shop there, and wholly excluding competitors from his hotel. Apart from this, persons other than guests are said *prima facie* to have the right to enter an inn or hotel without making themselves trespassers; for there is an implied licence for the public to enter; though such licence is in its nature revocable, and those thus entering become trespassers when they refuse to depart when requested.²

Guests.
Reception into
an inn.

Travellers and passengers received into an inn are "guests."³ What exactly constitutes reception into an inn to the extent needful to make the person so received a guest has given rise to some controversy. In *York v. Grindstone*⁴ it was decided, against the opinion of Holt, C.J., that if a traveller leave his horse at an inn, and lodge elsewhere, he is to be deemed a guest, "because it (the horse) must be fed, by which the innkeeper hath gain; otherwise, if he left a trunk or dead thing."⁵ More

stayer la tout le nuit, si soit apres robbe uncore le hoste ne serra charge pur ceo, car cest guest ne fuit aucun traveller: 1 Roll. Abr. Action sur Case (E) 4. In *Newton v. Trigg* (Case 166), 1 Show. (K. B.), 268, it is stated, "Innkeepers are compellable by the constable to lodge strangers; they may *detain the persons of the guests* who eat, or the horse which eats till payment." The words in italics are clearly no longer law.

¹ *Broadwood v. Granara*, 10 Ex. 417.

² *State v. Steele*, 19 Am. St. R. 573; *Commonwealth v. Power*, 48 Mass. 596, per Shaw, C.J., at 601.

³ A guest is "any one who patronises an inn as such": *Walling v. Potter*, 35 Conn. 183; "any one away from home receiving accommodation at an inn as a traveller generally speaking a lodger, is one who for the time being has his home at his lodging-place": *Pullman Palace Car Company v. Lowe*, 26 Am. St. R. 325.

⁴ 1 Salk. 388, 2 Ld. Raym. 866, in the name of *York v. Grenaugh*, commented on by Lord Lyndhurst, C.B., *Judson v. Etheridge*, 1 C. & M. 743, at 745, 747. *Grinnell v. Cook*, 3 Hill (N. Y.) 485, followed Holt, C.J.'s opinion. The authorities are collected in a note to 2 Parsons, *Contracts* (6th ed.), 153, where the conclusion is adverse to the innkeeper's liability as insurer, and in accord with the view of Holt, C.J. On this point see *Mason v. Thompson*, 26 Mass. 280.

⁵ In *Lynar v. Mossop*, 36 Upp. Can. Q. B. 230, a person asked for a room to change his dress in at an inn, which was assigned to him and a key handed him, which he did not use; after occupying the room for an hour, plaintiff went to his friend, with whom he remained. Next morning on returning for his portmanteau it could not be

than a hundred years afterwards occurred the next reported case, *Bennett v. Mellor*,¹ where plaintiff's servant took goods, which he had been unable to sell at the weekly market, to the defendant's inn, and asked the defendant's wife if he could leave them till the week following. She answered she could not tell, for they were full of parcels. The plaintiff's servant then sat down in the inn, had some liquor, and put the goods on the floor behind him, whence they were stolen. A verdict was given for the plaintiff, which, on motion for a new trial, was sustained, on the ground that, if the proposal of the plaintiff's servant had been accepted, the defendant would have been special bailee, and so not answerable where there was no "actual negligence"; but since the proposal had not been accepted, and the plaintiff's servant had sat down and was partaking of refreshment, he had thereby become a guest, with the consequential duty on the innkeeper to protect his goods or be answerable for their loss.

*Bennett v.
Mellor.*

This case was held "clearly distinguishable" in *Strauss v. County Hotel Company*,² because "there it was expressly found that the plaintiff had come within the house and had placed his goods near his chair."³ In *Strauss's* case the plaintiff arrived at a railway station where he was there met by one of the porters of the defendants' hotel, to whom he gave three packages, and asked him to take them to the adjoining hotel. At that time he intended to pass the night at the hotel, but after getting a telegram he decided to go on to Manchester the same day. He went into the coffee-room to dine, and there being told there was no joint ready, proceeded, *by the waiter's advice*, to the station refreshment-room, which was *under the same management as the hotel, and connected with it by a covered passage*.⁴ On his way he met the porter with his luggage, and told him to lock it up till he was ready to start for Manchester. The luggage was accordingly locked up in a room adjoining the refreshment-room, but,

*Strauss v.
County Hotel
Company.*

found. It was held, on the authority of *Geley v. Clerk*, 2 Cro. (Jac.) 189, and *Wintermute v. Clarke*, 5 Sandford (N. Y.), 242, that the plaintiff ceased to be a guest after he left the inn, and that the defendant was not liable as innkeeper. In the New York case of *Ingallsbee v. Wood*, 33 N. Y. 577, where a horse was left at an hotel, the owner never intending to be a guest, the innkeeper was held to be a mere ordinary bailee for hire, with no greater or different rights than if the defendant had been a livery-stable keeper merely. See *Healey v. Gray*, 68 Me. 489, 28 Am. R. 80. In *Hancock v. Rand*, 46 Am. R. 112, a general on service, who engaged rooms at an hotel at a fixed monthly price, with an understanding that, if he were satisfied and were not ordered away, he should stay till the spring, was held to be a guest. See the cases collected in the note at 118.

¹ 5 T. R. 273; *Houser v. Tully*, 62 Pa. St. 92.

² 12 Q. B. D. 27. Cp. *Palin v. Reid*, 10 Ont. App. 63, *ante*, 897; and *Adams v. Young*, 58 Am. R. 789.

³ On the authority of *Richmond v. Smith* 8 B. & C. 9, this latter ground of distinction seems very immaterial, and, if anything, a point for the plaintiff in *Strauss's* case. *Armistead v. White*, 17 Q. B. 261.

⁴ Cp. *Cromwell v. Stephens*, 2 Daly (N. Y. C. P.) 15; *Krohn v. Sweeny*, 2 Daly (N. Y.) 200.

Considered.

on the plaintiff's arrival at the platform, part of it was missing. The learned judge nonsuited on the ground that there was no evidence that the plaintiff ever became a guest of the defendants at their inn; and his ruling was upheld by the Queen's Bench Division, as the "relation of landlord and guest not having been made out, the action cannot be sustained." From the report of this case in the *Law Journal*¹ which is much fuller than that in the *Law Reports*, it appears that the view of the Court on the facts was that the refreshment-room was not part of the inn—the judge's view at the trial must have been that it *could* not be so considered—and that the removal of the plaintiff from the coffee-room to the refreshment-room was an act not different in its nature from going from one shop to another, and was not merely the removal from one portion of a building to another for more commodious serving. In this view the decision turns on the particular facts proved, and there is no conflict with *Bennett v. Mellor*;² as in *Bennett v. Mellor* the man was served his glass of refreshment in the house, while in this case the judge's view of the facts was that what occurred in the coffee-room and the subsequent order in the refreshment-room were distinct transactions.

Kent's view of
Bennett v.
Mellor.

Chancellor Kent's view of *Bennett v. Mellor* is that in that case "the responsibility of innkeepers was laid down with great strictness and even with severity;"³ nevertheless it has always been followed, and is quoted in the text-books as a binding authority.⁴ It is, however, clear law that the mere entrusting of goods does not constitute the bailor a guest. This was decided so early as the time of James I., when a person who came to an inn with a hamper of hats, and went away and left them there for two days, and in his absence they were stolen, was held to have no claim against the innkeeper except as a bailee.⁵

Mere entrust-
ing of goods
does not con-
stitute the
bailor a guest.

¹ 53 L. J. Q. B. 25.

² 5 T. R. 273, approved *Clute v. Wiggins*, 14 Johns. (Sup. Ct. N. Y.) 175. *McDonald v. Edgerton*, 5 Barb. (N. Y.) 560, is so far similar to *Ultzen v. Nicola* (1894), 1 Q. B. D. 92, that the point involved was the liability of an innkeeper for an overcoat handed to the barman by the plaintiff while drinking at the bar, and lost; the Court, however, laid down, at 562: "the purchasing of the liquor was enough to constitute the plaintiff a guest," and remarked, citing 2 Cro. (Jac.) 189, "it has been expressly adjudged that if the guest goes out to view the town for a while, intending to return, the innkeeper is liable for his goods lost in his absence. And so if he goes out and says he will return at night." Com. Dig. (B) (B 1), Action upon the Case for Negligence. Cp. per Bronson, J., *Grinnell v. Cook*, 3 Hill (N.Y.), 485, at 490.

³ 2 Kent, Comm. 594.

⁴ Story, Bailm. §§ 470, 471, 472, 479, 480, 482; 1 Sm. L. C. (9th ed.), 141; Wharton, Innkeepers, 15, 75, 76, 79, 98, 99, 106, 119, 130; Oliphant, Innkeepers (4th ed.), 220.

⁵ *Gelley v. Clerk*, 2 Cro. (Jac.) 188; Bacon, Abr. Inns (C), 5. As to leaving a horse for a fortnight with an intention to return, *Day v. Bather*, 2 H. & C. 14 (with this compare *The Case of an Hostler*, Yelv. 66), and as to leaving a valise for forty-eight hours without the intention to return, *Murray v. Marshall*, 59 Am. R. 152. In

The ground of the opinion of Smith, J., in *Medawar v. Grand Hotel Company*, which Fry, L.J., considered correct, but which was overruled by Lord Esher, M.R., and Bowen, L.J.,¹ was that the defendant there, the hotel keeper, was no more than a bailee, and the plaintiff was not a guest but a bailor of goods only. The division of opinion thus turned on the correctness of an inference of whether or not the circumstances of the plaintiff's reception and occupation at the hotel constituted him a guest. The facts proved were, that the plaintiff arrived early in the morning at the defendant's hotel, asked for a bedroom, and was told that the hotel was full and that he could not have a room; there was, however, one room temporarily unoccupied till the arrival of a lady and gentleman for whom it had been engaged, which the plaintiff might have the use of to wash and dress in. His luggage was accordingly sent up to this room by the hotel porter. In course of using the room to wash and dress in, the plaintiff opened his luggage and took therefrom a stand for brushes and toilet articles, in which was a drawer containing valuable trinkets. When he went down to his breakfast, he left this stand on the dressing-table. His other luggage was also left in the room, and with the door unlocked. After paying for his breakfast the plaintiff went out without giving any further heed to his luggage and did not return till past midnight. Meanwhile the lady and gentleman who had engaged the room arrived, and were shewn to it by the page boy, who, by the direction of the porter, moved the plaintiff's property into the corridor, and there left it. When the plaintiff came back and asked for his room he was told that he had not one; subsequently, however, one casually vacant was found, and this he occupied. His luggage was then removed from the corridor and placed in it. Next morning he discovered that the trinkets in the drawer of the stand had been stolen. The action was for their value. From these facts Smith, J., and Fry, L.J., drew the conclusion that "the plaintiff engaged the room merely for the purpose of washing and dressing; he did not insist upon any further right. He could not have been charged for any further occupation. He was not a guest in the hotel after he had washed and dressed and had had his breakfast,"² and he only left his property in the hotel in the expectation that

Medawar v. Grand Hotel Company.

View of Smith, J., and Fry, L.J.

Williams v. Gessey, 7 C. & P. 777, a box was sent by A to an inn kept by B who booked parcels for carriers, but did not receive anything for so doing. The person who took the box told B to keep it till A called for it. B replied, Very well. The box was lost. In an action of *trover*, held, no evidence of conversion. See also the same case, *sub nom.* *Williams v. Gesse*, 3 Bing. (N. C.) 849.

¹ (1891) 2 Q. B. 11.

² "It cannot," says Lord Esher, M.R., *l. c.* at 20, "be contended that he was only to wash and dress in the room; he was to have the use of the room until the persons by whom it had been engaged should arrive."

Judgment of
the Court of
Appeal.

by doing so he might have a preferential claim to the occupancy of some other room."¹ The opinion of Lord Esher, M.R., and Bowen, L.J., which prevailed, was: "Until the room is wanted for the new guest, it seems to me² that, according to the common law and custom of the realm, the innkeeper is bound to afford accommodation to any one who offers himself as a guest. He has no right to be like the dog in the manger, and say 'I shall want the room for another person this day week, and therefore I will not let it to you to-day.' Until it is wanted by those who have acquired a right to occupy it, an arriving guest is entitled to find accommodation in it. Therefore the plaintiff, when he arrived in the morning, had a right to such accommodation in that room, which was then empty, as could be furnished to him consistently with the engagement which the hotel-keeper had made with the persons who were to have the use of it in the course of that day or the following day."

Reasonable
time must be
allowed to
determine the
status of guest.

Further, it was laid down that even the arrival of the lady and gentleman and their occupancy of the room they had pre-engaged, did not determine *eo instanti*, the plaintiff's status as guest. "A reasonable time must be allowed for him to carry away or secure his effects; and I think that in the present case the relation of host and guest between the defendants and the plaintiff, and the legal liability of the defendants, continued until a reasonable time after a demand for the room had been made by the persons who had engaged it, and that the defendants had no right the moment they wanted the room to eject the goods into the corridor and leave them unguarded there without any notice to the plaintiff."³

Medawar v.
Grand Hotel
Company, a
decision on
particular
facts.

In arriving at his conclusion Lord Esher, M.R., remarked: "We must bring into play our knowledge of the world." This decision, therefore, manifestly stands on the particular collocation of facts. For all that, probably very few of that experienced class of citizens of the world—habitual travellers—realised before this decision in how commanding a position admission to an hotel bedroom for the sole purpose of washing and dressing places them.

Position of the
plaintiff if not
a guest.

Assuming the hotel-keeper was merely a bailee of the goods left in the bedroom, he was either bailee for reward or involuntary bailee. If the latter, then affirmative evidence of the lack of that slight degree of diligence that the law requires would have to be shewn.⁴ If the former, in the words of Smith, J.:

¹ (1891) 2 Q. B. 11, per Fry, L.J., at 29.

² *L. c.* Bowen, L.J., at 27. *Ante*, 1010.

³ *Ante*, 907, 908.

⁴ (1891) 2 Q. B. 16. There is an American case, *Wear v. Gleason*, 20 Am. St. R.

186, that may be looked at in connection with the case in the text.

² *L. c.* per Bowen, L.J., at 25.

⁴ *L. c.* at 19.

"The bailor has to prove, in order to render the bailee liable, actual negligence of the bailee which caused the loss, and if it be proved that the loss was occasioned by his own neglect, he has no case against the bailee."

In an American case,¹ where also it is held to be a question of fact, to be decided upon all the evidence, whether the relation of guest and innkeeper is established, the elements to be taken into consideration in determining when the status of guest is constituted are thus summed up: "The duration of the plaintiff's stay, the price paid, the amount of accommodation afforded, the transient or the permanent character of the plaintiff's residence and occupation, his knowledge or want of knowledge of any difference of accommodation afforded to, or price paid by, boarders and guests, are all to be regarded in settling the question. It is expressly decided in *Berkshire Woollen Company v. Proctor*,² however, that an agreement with an innkeeper for the price of board by the week is not decisive that the relation is that of boarder instead of guest."

Passing from a consideration of the matters which go to constitute a guest to a consideration of the various aspects of the relation when constituted between the innkeeper and his guest—whom, says Ashhurst, J.,³ "the law has fixed an indelible obligation" on the innkeeper to receive—we have first to see what liability for negligence is raised thereby.

The law of an innkeeper's liability has been said to be peculiar to the English law; and the ancient writ in the Register lays a duty on innkeepers "by the law and the custom of England," the analogy of which has been seized on in other cases. There is, however, a marked similarity to the rule of the civil law.⁴ By the Prætor's Edict a peculiar responsibility was laid upon shipmasters, innkeepers, and stable-keepers, who were made liable for all losses not arising from inevitable casualty or overwhelming force. *Ait Prætor: Nautæ, caupones, stabularii, quod cujusque saluum fore receperint*,

¹ Hall v. Pike, 100 Mass. 495.

² 61 Mass. 417, at 424. Story, Bailm. § 477.

³ Kirkman v. Shawcross, 6 T. R. 14, at 18; see, too, per Lord Kenyon, C.J., at 18, referring to 3 W. & M. c. 12 and 21 G. II. c. 28.

⁴ Per Holt, C.J., Lane v. Cotton, 12 Mod. 472, at 481.

⁵ See D. 23, 2, 43 § 9.

⁶ As to this word, it is used in the second sense given for it in Facciolati and Forcellini's Lexicon (*sub verbo*): *Qui mercede homines eorumque jumenta hospitio excipit. Nam stabulum tum ad jumenta pertinet, tum ad homines.* See note by Denman, J., to judgment of Brett, J., in *Nugent v. Smith*, 1 C. P. D. 19, at 29. The conclusion of the passage cited by Denman, J., is as follows:—*Videtur a caupone differe in eo, quod caupo viatoribus necessaria ad victum præbet; stabularius etiam tectum et lectum.* D. 47, 5, 1. See Pothier, Pand. 4, 9, § 1, 2. Compare Hor. Sat. i. 5, 4—

"Inde forum Appii
Differtum nautis cauponibus atque malignis."

*nisi restituant, in eos iudicium dabo.*¹ To which is subjoined the remark of Ulpian: *Maxima utilitas est hujus edicti; quia necesse est plerumque eorum fidem sequi, et res custodiæ eorum committere. Ne quisquam putet graviter hoc adversus eos constitutum; nam est in ipsorum arbitrio, ne quem recipiant.* And the explanation is given, *Nisi hoc esset statutum, materia daretur cum furibus adversos eos, quos recipiunt, coeundi; cum ne nunc quidem abstineant hujus modi fraudibus.*² The extent of the liability is indicated as follows: *At hoc edicto omnimodo qui recepit tenetur, etiamsi sine culpa ejus res perierit, vel damnum datum est; nisi si quid damno fatali contingit. Inde Labeo scribit, si quid naufragio aut per vim piratarum perierit non esse iniquum exceptionem ei dari. Idem erit dicendum et si in stabulo, aut in caupona vis major contegerit.*³

Limitations
in the Civil
law.

The responsibility of innkeepers by the Civil law was further limited in several respects. It was not enough to charge the innkeeper that the guest had brought his goods or baggage to the view or the knowledge of the innkeeper; he must have delivered them into his charge. Neither was the innkeeper responsible for the acts of other guests or persons at the inn, though he was responsible for the acts of his servants and boarders done in the house. Neither was he compelled to receive the guest when he had room, as he is by the common law.⁴ These limitations are found in the jurisprudence of those nations of Europe which have taken the Civil law for their model,⁵ and are the variations that have been urged, amongst others, as grounds for inferring a native origin to our law.

Liabilities of
English
innkeepers.

The liabilities of an English innkeeper are treated at length in Calve's Case,⁶ which is the leading English authority upon the subject. There the exact point resolved was that if a man come to an inn and deliver his horse to the innkeeper to be put to pasture, and the horse be stolen, the innkeeper is not responsible, because the case is outside the terms of the original writ⁷ by which the duties of innkeepers are specified. It is, however,

¹ D. 4, 9, 1, pr.

² D. 4, 9, 1, 1.

³ D. 4, 9, 3, § 1.

⁴ *Rex v. Ivens*, 7 C. & P. 213; *Hawthorn v. Hammond*, 1 C. & K. 404; 1 Hawk. P. C. Bk. 1, c. 78, Of nuisances relating to Public Houses, § 1, 2; *State v. Steele*, 19 Am. St. R. 573.

⁵ *Story*, Bailm. §§ 466, 467, citing Dig. 4, 9, and Pothier, *Traité du Dépôt*, n. 79, 80.

⁶ 8 Co. Rep. 32 a, 1 Sm. L. C. (9th ed.), 132. Cp. Com. Dig. Action upon the Case for Negligence (B), Action against a common Innkeeper.

⁷ Fitzh. De Nat. Brev. 94 B. *Registrum Brevium*, 105 a: *De transgressionem quando quis depredatus est in hospitio transcendo per patriam*. The distinction is pointed out in *Warbrook v. Griffin*, 2 Brownl. 254, at 255: "If the owner desire that his horse should go to grass, the innkeeper shall not answer; but if an innkeeper receive the horse, and of his own head puts the horse to grass, and he is stolen, there the innkeeper shall be charged."

from Coke, C.J.'s, commentary on the words of this writ, clause by clause, as it is set out in the report, that the principles of the law with regard to innkeepers are to be collected. They are :

First : The action must be against the keeper of a common inn.¹ Principles laid down in Calve's Case.

Second : The thing in respect of which the action is brought must be *infra hospitium*.²

Third : The innkeeper is bound in law to keep the goods of his guest within the inn, "without any stealing or purloining,"³ unless by the guest's own servant or by fault of the guest.

Fourth : If the guest is beaten in the inn, the innkeeper is not answerable, "for the innkeeper ought to keep the goods and chattels of his guest, and not his person."⁴

For all that, it is the duty of the innkeeper to take reasonable care of the persons of his guests, so that they are not injured by want thereof while they are in his house. Thus, in *Sandys v. Florence*,⁵ a statement of claim being amended so as to set out that, while the plaintiff was using an hotel, of which the defendant was proprietor, as a guest for reward to the defendant, by the negligence of the defendant the ceiling of the room in which the plaintiff was fell upon and injured him, was held to disclose a cause of action ; though it was conceded that, as originally drawn, omitting the allegation that plaintiff was received as a guest for reward to the defendant, the claim was not sustainable. Duty to take reasonable care of the persons of the guests.

The extent of the innkeeper's obligation to answer for the safety of property brought to his inn by a guest was the subject of decision by the King's Bench in *Burgess v. Clements*.⁶ Plaintiff Extent of innkeeper's obligations. Burgess v. Clements.

¹ 8 Co. Rep. 32 a. In *Parker v. Flint*, 12 Mod. 254, 1 Ld. Raym. 479, *nom.* *Parkhurst v. Foster*, Holt, C.J., held that a person may hire lodgings at an inn and so not be a guest ; and *à fortiori* this is true of a private house, Com. Dig. Action upon the Case for Negligence (B) (B 2) ; *Holder v. Soulby*, 8 C. B. N. S. 254. Where a gig was stolen that was put by the ostler outside the innyard, in a part of the street where the defendant was in the habit of placing the carriages of his guests on fair days, and was not put there at the instance of the plaintiff, the plaintiff recovered : *Jones v. Tyler*, 1 A. & E. 522.

² 8 Co. Rep. 32 b. In *Stannian v. Davis*, 1 Salk. 404, the innkeeper was held liable where a horse was taken out of the inn, and immoderately ridden and whipped, though it did not appear by whom. Bags of wheat stolen during the night from an out-house appurtenant to the inn, where loads of that description were ordinarily received, were held to be *infra hospitium* : *Clute v. Wiggins*, 14 Johns. (Sup. Ct. N. Y.) 175 ; but see *Albin v. Presby*, 8 N. H. 408, to the contrary.

³ 8 Co. Rep. 33 a ; *Walsh v. Porterfield*, 87 Pa. St. 376. There is no distinction between money and goods : *Kent v. Shuckard*, 2 B. & Ad. 803.

⁴ 8 Co. Rep. 33 b ; *Candy v. Spencer*, 3 F. & F. 306, where goods were left in the lobby of an inn ; *Hallenbake v. Fish*, 8 Wend. (N. Y.) 547 ; *Norcross v. Norcross*, 53 Me. 163 ; where goods were stolen from a sea-bathing house provided for a guest, but separate from the inn, *Minor v. Staples*, 71 Me. 316, 36 Am. R. 318.

⁵ 47 L. J. C. P. 598.

⁶ 4 M. & S. 306. In Roll. Abr. Action sur Case (D) Vers Hosteler, pl. 3, it is laid down that an infant innkeeper cannot be held liable in an action on the case for the loss of his guest's goods ; but see *Cross v. Andrews*, 1 Cro. (Eliz.) 622. See Y. B. 42 Ed. III. 11, pl. 13, for an action on the custom of England that in

went to the defendant's inn as a guest, and was shewn into the travellers' room. Subsequently he asked for a room in which he might shew his goods. The innkeeper's wife assented, "accompanied with that which is equivalent to telling him that he must take charge of it, for she says, 'You may have the room; there is a key to the door, and you may lock it.'" The plaintiff took the room, and displayed his goods there to a customer. Whilst he was doing so, the door twice opened and a stranger looked in. The customer suggested the necessity of care in view of the suspicious conduct of the stranger. After he had gone, the plaintiff left the room without taking any precaution, and did not return till nine o'clock, when two of his boxes containing valuables were missing. The door of the room opened into a gateway which led to the street, and there was a key in the lock on the outside. The plaintiff did not lock the door when he went away, and "did not know that he even shut it." The jury were directed that an innkeeper is *prima facie* answerable for the goods of his guest in his inn, but that a guest by his own conduct may discharge the innkeeper from his responsibility. They found for the innkeeper.

Prima facie
liability of inn-
keeper
rebuttable.

On motion for a new trial, the direction of the judge at the trial was sustained. The Court pointed out that, admitting an innkeeper to be *prima facie* liable, there may be circumstances by which that *prima facie* liability may be discharged—as, for example, if the guest by his own neglect induces the loss,¹ or himself introduces the person who purloins the goods. Neither is it a part of the business of an innkeeper to provide show-rooms for his guests, but only convenient lodging-rooms and lodging. In the case under discussion, the requirement of the plaintiff was for a room to display his wares, a necessary attendant on which was the introducing a number of persons over whom the innkeeper could have no check or control, and so for a purpose wholly alien from the ordinary purposes of an inn, which is *ad hospitandos homines*. Again, there was a duty on the plaintiff to use "at least ordinary diligence" in circumstances of suspicion; "for in general though a traveller who resorts to an inn may rest on the protection which the law casts around him, yet, if circumstances of suspicion arise, he must exercise ordinary care;"² and the intrusion of a stranger twice while he was dis-

Duty on
guest.

all common inns the innkeeper and his servants should take good care of what things their guests had in their chamber in the inn; Reeves, *Hist. of the English Law* (2nd ed.), vol. iii. 91; Shep. Abr. Innes. The law is now subject to the limitations imposed by The Innkeepers' Liability Act, 1863 (26 & 27 Vict. c. 41.)

¹ As where the guest refused to put his valuables in the place suggested by the landlord: *Jones v. Jackson*, 29 L. T. (N. S.) 399.

² 4 M. & S. 306, per Lord Ellenborough, C.J., at 312.

playing his goods should have excited sufficient suspicion to have induced the precaution of locking the door after him.

The following year a very similar case, *Farnworth v. Packwood*,¹ was tried before Le Blanc, J., one of the judges who gave judgment in *Burgess v. Clements*; and he there states the law very succinctly: "A landlord is not bound to furnish a shop to every guest that comes into his house; and if a guest takes exclusive possession of a room, which he uses as a warehouse or shop, he discharges the landlord from the common law liability."

Farnworth v. Packwood.

In *Richmond v. Smith*² a guest chose to have his goods carried into the travellers' room in preference to having them placed in his bedroom, as was the usual practice of the inn. The plaintiff was held entitled to recover on a loss, for, "if it had been intended by the defendant not to be responsible unless his guests chose to have their goods placed in their bedrooms or some other place selected by him, he should have said so."

Richmond v. Smith.

In *Dawson v. Chamney*³ another element came in. The plaintiff gave his horse in charge to defendant's ostler, who put him in a stall with another horse, by whom he was grievously kicked. Plaintiff brought his action, and Cresswell, J., directed the jury that, if they were of opinion that the defendant, by himself or his servants, had been guilty of direct injury or of negligence, they should find for the plaintiff; otherwise, for the defendant. This was objected to as a misdirection, but was sustained by the Queen's Bench, which held that the damage raised a presumption of negligence, calling on the defendant for an answer. So soon, however, as he satisfied the jury that he had not been guilty of negligence, the verdict was rightly entered for him. On general grounds of law, the fact that a horse has kicked another horse is not any evidence of negligence,⁴ and it appears from this case, following *Calye's Case*,⁵ that the innkeeper is not an insurer against injury, and "shall not be charged, unless there be a default in him or his servants, in the well and safe keeping and custody of their guest's goods and chattels within their common inn; for the innkeeper is bound in law to keep them safe without stealing or purloining."⁶

Dawson v. Chamney.

*Dawson v. Chamney*⁷ was unfavourably commented on in

¹ 1 Stark (N.P.) 249; in a note to this case, at 251, there is a report of *Burgess v. Clements*. ² 8 B. & C. 9. ³ 5 Q. B. 164. *Ante*, 963, n. ⁴

⁴ *Cox v. Burbidge*, 13 C. B. N. S. 430. *Ante*, 96.

⁵ 8 Co. Rep. 32 a, at 33 a; cp. Moore, 78, pl. 207.

⁶ Doubts have sometimes arisen as to what goods the innkeeper should answer for. There is an exhaustive judgment as to this in *Finkerton v. Woodward*, 33 Calif. 557.

⁷ 5 Q. B. 164. Cp. *Merritt v. Claghorn*, 23 Vt. 177, the facts and extracts from the judgment in which are set out, 2 Parsons, Contracts (6th ed.), 146 n. 11. In *Ingallsbee v. Wood*, 33 N. Y. 577, the liability of an innkeeper for the loss of the horse of his guest caused by a fire which burnt down the innkeeper's stable is said to be that of an

Morgan v.
Ravey.

Judgment by
Pollock, C.B.

Morgan v. Ravey.¹ The rule as to the innkeeper's liability there laid down was that he is a general insurer, for that is what it amounts to, and that "there is a defect in the innkeeper wherever there is a loss not arising from the plaintiff's negligence, the act of God or the Queen's enemies."² "The only case that points the other way is *Dawson v. Chamney*;" and Pollock, C.B., referred to a report of that case in 7 Jurist 1037, where it was said "there was no evidence of the manner in which the horse received the injury for which the action was brought." The learned Chief Baron then continues: "This may be the explanation of that case; for though damage happening to the horse from what occurred in the stable might be evidence of *defectus* or neglect, still, if it was not shewn how the damage arose, it was not even shewn that it arose from what occurred in the stable." The reporter in a note has, however, disproved this suggestion by pointing out that the judgment was written, and that in the written judgment the injury was stated to have been received "by the kick of another horse." The case would thus be a negation of liability on an innkeeper, where he had exercised all caution in stabling a guest's horse; and where by the unknown viciousness of another guest's horse an injury was inflicted, the innkeeper was not to be held an insurer to that extent. Assuming the innkeeper to be free from blame, the accident would have occurred from inevitable accident, and thus, though not within the terms of Pollock, C.B.'s, proposition in *Morgan v. Ravey*, at least within the principle of it. This view can only be sustained by regarding the innkeeper as an insurer in certain respects only, and not wholly as a common carrier. If this be the right view, *Dawson v. Chamney*³ was the case of inevitable accident arising from the kick of a horse without the negligence of the defendant, and the plaintiff was disentitled to recover, because he did not shew a cause of action.

Loss of goods
by accidental
fire.

The question whether at common law the loss of goods of the guest by an accidental fire affects the innkeeper with liability is of interest in this connection.⁴ If the innkeeper is in the same position as a common carrier, which is held to be the law by many authorities,⁵ then he is not exonerated from responsibility

ordinary bailee for hire. See 2 Parsons, Contracts (6th ed.), 153. In Scotland the law appears to be the same, *M'Donell v. Ettles*, Decisions of the Court of Session, 15th Dec. 1809.

¹ 6 H. & N. 265.

² *L. c.* per Pollock, C.B., at 277.

³ 5 Q. B. 164. As to agistment, see *ante*, 979.

⁴ As to fire generally, see *ante*, 567-606.

⁵ *Morgan v. Ravey*, 6 H. & N. 265; there is also a report of the case at *Nisi Prius*, *sub nom.* *Morgan v. Rarey*, 2 F. & F. 283. See note to *Cutler v. Bonney*, 18 Am. R. 127, at 130.

by reason that the guest's goods are destroyed by an accidental fire.¹ This is itself a disputed point. Chancellor Kent² has, Opinion of
Chancellor
Kent. indeed, said that innkeepers "are held responsible to as strict and severe an extent as common carriers;" but he goes on to say that "the principle was taken from the Roman law, and adopted into modern jurisprudence." The Roman law, however, though strict and severe, did not affect the innkeeper with a liability so severe as that of a common carrier; and in the case of accidental fire the innkeeper was not liable at all by Roman law, since this was included under the head of inevitable accident.³ Chancellor Kent further on⁴ says: "The responsibility of the innkeeper does not extend to trespasses committed upon the person of the guest, nor does it extend to loss occasioned by inevitable casualty, or by superior force, as robbery." Whence it may be concluded that, in the earlier passage, he did not intend any more extensive meaning. Story,⁵ too, says: "Innkeepers Opinion of
Story. are not responsible to the same extent as common carriers. The loss of the goods of a guest while at an inn, will be presumptive evidence of negligence on the part of an innkeeper or of his domestics. But he may, if he can, repel this presumption by shewing that there has been no negligence whatsoever; or that the loss is attributable to the proper negligence of the guest; or that it has been occasioned by inevitable casualty or by superior force." Further on the learned author refers to the *dictum* of Bayley, J., in *Richmond v. Smith*,⁶ and says: "The case, however, Richmond v.
Smith. did not call for the *dictum*, and it has since been overturned by a solemn decision, if it meant to suggest so unqualified a proposition as that the liability of innkeepers and common carriers is of the same extent and subject only to the like exceptions."⁷ Some of Story's late editors have shewn more respect for the *dictum*

¹ Per Dallas, C.J., in *Thorogood v. Marsh, Gow* (N. P.) 105.

² 2 Comm. 592.

³ Story, *Bailm.* § 465; *Ersk. Inst. Bk. 3, tit. 1, § 28*; *Stair, Inst. bk. i. tit. 13, § 3*, and note in Brodie's Edition. *Quia in locato conducto culpa, in deposito dolus duntaxat præstat, at hoc edicto omnimodo qui recepit tenetur, etiamsi sine culpa ejus res perit, vel damnum datum est; nisi si quid damno fatali contingit. Inde Labeo scribit, si quid naufragio aut per vim piratarum perierit, non esse iniquum, exceptionem ei dari. Idem erit dicendum et si in stabulo, aut in caupona vis major contigerit.* D. 4, 9, 3, § 1.

⁴ 2 Comm. 593.

⁵ *Bailm.* § 472; also Story, *Contracts* (2nd ed. 1847), § 749: "Whenever there is a loss by a guest at an inn, the innkeeper is *prima facie* responsible. He may, however, excuse himself," &c.

⁶ 8 B & C. 9, at 11: "It appears to me that the innkeeper's liability very closely resembles that of a carrier. He is *prima facie* liable for any loss not occasioned by the act of God or the King's enemies; although he may be exonerated where the guest chooses to have his goods under his own care." This *dictum* has been adopted by Nelson, C.J., in *Piper v. Manny*, 21 Wend. (N. Y.) 284; see *Purvis v. Coleman*, 21 N. Y. 111, at 116.

⁷ *Dawson v. Chamney*, 5 Q. B. 164.

than for their author's text, which they have altered to conform to it.¹

Various
opinions.
Chitty.

Chitty, "Law of Contracts,"² says: There must be a *default* on the part of the innkeeper; and such default is to be imputed to him wherever there is a loss not arising from the plaintiff's negligence,³ the act of God, or the Queen's enemies."

Redfield.

Redfield, in his "Law of Carriers,"⁴ thus sums up what he regards to be the law, that the innkeeper "is presumptively responsible for all injuries happening to the goods of his guests and by them entrusted to his care; and that he cannot exonerate himself except by shewing that he did all to insure their safety which it was in his power to do, and that no default is attributable to his servants or guests. This brings the rule of law on this subject so near to that which obtains in the case of common carriers that the distinction is not of much moment unless in cases of loss by accidental or incendiary fires, and possibly in some few other cases. Hence it is now becoming to some extent common for the Courts to state the degree of responsibility of these two classes of persons in the same or similar terms, and thus to declare that innkeepers are responsible for the safety of the property of their guests except for damage resulting from inevitable accident or irresistible force, being that of the public enemy."⁵

Bennett, J.

On the other hand, the conclusion of Bennett, J., at the end of a long judgment in *Mateer v. Brown*,⁶ reviewing and commenting on all the cases, is "that some Courts as well as commentators are, at length, returning to the sound and healthy

¹ See Story, *Bailm.* (8th ed.), by Bennett, § 472.

² (12th ed.), 441.

³ *Schultz v. Wall*, 134 Pa. St. 262, 19 Am. St. R. 686, excerpts from the innkeeper's liability goods stolen in his house "by the servant or companion of the guest." In *Cross v. Andrews*, 1 Cro. (Eliz.) 622, the innkeeper sought to excuse himself by a plea of insanity; but this was held no defence, "for the defendant, if he will keep an inn, ought at his peril to keep safely his guest's goods; and although he is sick, his servants then ought carefully to look to them." *Ante*, 54.

⁴ §§ 595 with the note, 596, where the whole subject is reviewed by the author, the judge who decided *McDaniels v. Robinson*, 26 Vt. 316, 62 Am. Dec. 586, where there is a note on "guests" and "boarders." See *Magee v. Pacific Improvement Company*, 35 Am. St. R. 199.

⁵ See *Holder v. Soulbey*, 8 C. B. N. S. 254. In *Hulett v. Swift*, 33 N. Y. 571, it is said: "It is true that the liability of the innkeeper, by the custom of the realm, was not unlimited and absolute, and that the loss of the goods of the guest was merely presumptive evidence of the default of the landlord. But this presumption could only be repelled by proof that the loss was attributable to the negligence or fraud of the guest, or to the act of God or the public enemy." This, however, is denied to be law in *Cutler v. Bonney*, 18 Am. R. 127; and *Merritt v. Cleghorn*, 23 Vt. 177, is followed, where "Judge Redfield, delivering the opinion of the Court, reached the conclusion that where there was no negligence there was no responsibility for loss by fire." *Cp. Mason v. Thompson*, 26 Mass. 280.

⁶ 1 Calif. 221. The judgment of Bennett, J., is set out in a note to Story, *Bailments* (8th ed.), § 472; *Shaw v. Berry*, 31 Me. 478; *Hulett v. Swift*, 42 Barb. (N. Y.) 230, 33 N. Y. 571; *Sibley v. Aldrich*, 33 N. H. 553.

principle of the common law, which places the liability of innkeepers and carriers on the same ground." This judgment narrows the controversy to a single point. The common law is contained in the writ in the "Registrum Brevium"¹ and Coke's "Commentary."² The writ says the innkeeper shall be responsible *pro defectu*; which Sir Edward Coke translates by *default*. Innkeeper responsible *pro defectu*. Bennett, J., in *Mateer v. Brown*, says the "uncertainty and confusion which has been thrown over this branch of the law have arisen from confounding the word *defectu* in the writ, and the word *default*, used by Lord Coke as its translation, with the term *negligence*, an error into which Judge Story himself seems to have fallen."³ But if error arises from confounding *default* and *negligence*, error would seem no less to arise from confounding "default" with "without default." In any event the law in America seems unsettled, though the latest case⁴ accepts the distinction between the liability of an innkeeper and a common carrier; while in England the rule of the common law is practically unimportant by reason of 14 Geo. III. c. 78, s. 86, which provides that "no action, suit, or process whatever shall be had, maintained, or prosecuted against any person in whose house, chamber, stable, barn, or other building, or on whose estate, any fire shall accidentally begin, nor shall any recompense be made by such person for any damage suffered thereby; any law, usage, or custom to the contrary notwithstanding."

Law in America unsettled.

Returning to the discussion of the cases in the order of the date of their decision, the next to note is *Armistead v. Wilde*,⁵ where the plaintiff was held disentitled to recover, by reason of his own negligence. Plaintiff's servant, after ostentatiously displaying a large sum of money in the public room of defendant's inn, put it in an ill-secured box, and left the box in the public room for the night. In the morning the money was gone. There was strong ground to suspect that one of those to whom the notes had been displayed was the thief. At the trial the judge directed the jury to find for the plaintiff, unless they thought the traveller "had been guilty of gross negligence in leaving the money in the travellers' room." The jury found for the defendant. A rule was granted on objections to the judge's direction, under the impression that the direction was "that the jury were to consider whether a prudent man would of his own accord have taken the parcel to the inn-

Armistead v. Wilde.

¹ 105a. *De transgressionibus*. Fitzh. De Nat. Brev. 94 B.

² Calye's Case, 8 Co. Rep. 32 a.

³ Story, Bailm. § 470.

⁴ *Cutler v. Bonney*, 18 Am. R. 127. There is a very ample note to the report of this decision embracing a review of the principal authorities on both sides, with, however, a bias to the view opposed to the decision.

⁵ (1851) 17 Q. B. 261.

keeper and left it with him, or have taken it to his own room and locked it up."¹ On the argument, the other facts appearing, and it being made evident that the judge's direction was to be applied only to the facts of the case, the rule was discharged, on the ground that each case must depend on its own circumstances, and that, though the innkeeper is *prima facie* liable, his liability may be rebutted by proof of negligence on the part of the guest leading to the loss. The jury having found the negligence, and, in the opinion of the Court, on ample evidence, the verdict was sustained. Lord Campbell, C.J., however, doubted whether to require gross negligence of the guest in order to discharge the innkeeper was not a direction too favourable to the plaintiff, and expressly guarded the decision of the Court against laying down "that negligence on the part of the guest conducing to the loss will not exonerate the landlord unless it amount to *crassa negligentia*."² This very point came before the Court in *Cashill v. Wright*,³ when Erle, J., thus formulated the rule: "We think that the rule of law resulting from all the authorities is that, in a case like the present [*i.e.*, where a gold watch and money were stolen from the plaintiff's bedroom in defendant's inn], the goods remain under the charge of the innkeeper and the protection of the inn, so as to make the innkeeper liable as for breach of duty, unless the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances."

Cashill v.
Wright.
Rule of law
stated by
Erle, J.

This statement was said by Willes, J., in *Oppenheim v. White Lion Hotel Company*,⁴ to lay down "the proper definition of negligence, in terms which are not to be mistaken." In the same case the same learned judge explains a passage in the report of *Calye's Case*⁵ which had been the subject of frequent misunderstanding. It is there said: "It is no excuse for the innkeeper to say that he delivered the guest the key of the chamber in which he is lodged, and that he left the chamber door open; but he ought to keep the goods and chattels of his guest there in safety." This has often been referred to as an authority for the proposition that where the innkeeper has given his guest a key, he has thereby relieved himself of his common law liability.

Oppenheim v.
White Lion
Hotel Com-
pany.

Passage in
the report of
Calye's case
explained.

¹ Per Patteson, J., 17 Q. B., at 265.

² L. c. at 266.

³ (1856) 6 E. & B. 891; cp. *Fowler v. Dorlon*, 24 Barb. (N. Y.) 384, holding that loss of the goods of a guest at an inn is *prima facie* evidence of negligence on the part of the innkeeper.

⁴ L. c. at 900.

⁵ (1871) L. R. 6 C. P. 515, at 521. The report in the Law Reports of the passage referred to in the text is very obscure. The Law Journal Report, 40 L. J. C. P. 231, is, however, quite clear.

⁶ Co. 8 Rep. 32 a, at 33 a.

Willes, J., points out¹ that this is not so; since it is by no means laid down that proof of mere neglect to use the key is, in law, conclusive to discharge the innkeeper; and that in the succeeding passage to that quoted, the report intimates that the guest may by his conduct release the innkeeper from his common law obligation, Willes, J., says: "He [Sir Edward Coke] evidently means that the fact of the guest having the means of securing his door and neglecting to avail himself of them affords the innkeeper no excuse, by way of plea, as matter of law. The giving the guest a key, or giving a warning to lock his door, would certainly be a circumstance which might be urged in the innkeeper's favour. By omitting to lock his door, a jury might well think that the guest chose to take the risk of robbery upon himself, and that he ought to have taken more care."² There is no question of law in this, but one of fact only, and that is whether the guest has, or has not, exercised reasonable care, in each case. This is for the jury if, in the opinion of the Court, there is any evidence that can be left to them;³ and they should be instructed to bear in mind that the innkeeper is not invested with the character of an absolute and unqualified insurer, and that failure on the guest's part to use reasonable care is enough to discharge him from liability.⁴

Willes, J.'s, explanation.

Reasonable care of the guest a question of fact.

The point whether the guest was negligent in entrusting his luggage to the particular servant of the innkeeper through whom the loss happens does not appear ever to have been taken in an English case; probably, because the servants in an English inn till quite recently, were not so numerous as to accentuate the division of responsibility, as it is accentuated in the huge American hotels. There are, however, some valuable remarks on this point in the charge to the jury in the case of *Elcox v. Hill*,⁵ which were affirmed by the Supreme Court of the United States. "Travellers must be presumed to know the relative duties of the different classes of employes about an hotel, that is to say, they have no right to intrust their baggage to the care of the table-waiter or to the ostler, from the fact that it is not the duty of such employes to look after or care for the baggage, or take the custody of it."

Negligence of the guest in entrusting luggage to any particular servant of the innkeeper.

Elcox v. Hill.

¹ L. R. 6 C. P. 515, at 520.

² See *Mitchell v. Woods*, 16 L. T. (N. S.) 676, where Kelly, C.B., ruled that it is not negligence for a guest at an hotel to omit to lock his door." Cp. *Sanders v. Spencer*, Dyer, 266 b.

³ *Herbert v. Markwell*, 45 L. T. 649.

⁴ *Spice v. Bacon*, 36 L. T. (N. S.) 896. In *Purvis v. Coleman*, 21 N. Y. 111, at 117, it is said to be "the well-settled law of this State that if the plaintiff's negligence has caused or contributed to the loss or injury, an action against the carrier cannot be maintained." If it is shewn that the plaintiff was intoxicated and this contributed to the loss, the plaintiff cannot recover: *Walsh v. Porterfield*, 87 Pa. St. 376. *Ante*, 168.

⁵ 98 U. S. (8 Otto) 218, at 222.

Money or jewelry left with a waiter.

"Probably, if a guest at an hotel should deposit his money or jewelry with a table waiter, or cook, or bell-boy without direction to do so from the landlord or clerk in charge, or leave his satchel containing money and valuables unprotected in the halls or public passages, or leave his money exposed in his room unlocked, no one would hesitate to say such an act was an act of negligence, to such an extent as to excuse the landlord in case of loss."¹

Responsibility for luggage given in custody of the servants of the hotel-keeper.

When the guest's luggage is placed in the custody of the servants of the hotel-keeper, the responsibility for the safe custody of it rests upon him. If the luggage is lost, in order to escape liability the hotel-keeper must shew two things—(1) that the owner was guilty of negligence, and (2) that this negligence conduced to the loss. If he fails in either of these particulars, the owner is entitled to recover.²

Is the negligent person a servant?

There still remains the possibility, at any rate, of dispute as to whether the negligent person is the servant of the innkeeper in the particular case. The considerations governing this branch of law are illustrated by two cases—the English case of *Bather v. Day*,³ and the American case of *Coskery v. Nagle*,⁴ which was decided mainly on the authority of the English one.

Bather v. Day.

In *Bather v. Day*,⁵ the innkeeper sought immunity by shewing a private arrangement with the ostler, by which the stables and the profits arising from them were handed over to him to make what profit he could out of them. But, though the acts on which the action was based were the misfeasance of the ostler, the innkeeper was held liable, and on broad and manifest considerations of public policy.⁶

Coskery v. Nagle.

The American case raised a point of even more general interest; for it was there decided that when a traveller arrives at a station, and is met by the porter of an hotel who indicates to the traveller a certain vehicle by which he will be taken to the hotel, and the traveller delivers to the porter his baggage or the check

¹ In this case evidence was tendered that the servant who received the luggage had confessed to having stolen it, but it was held inadmissible, on the ground that though on the trial of the servant it was admissible against himself, yet against the landlord it was mere hearsay; and that the failure of the landlord to prosecute did not render the statement any more evidence, since there was no greater duty on him to do so than on any other citizen.

² *Medawar v. Grand Hotel Company* (1891), 2 Q. B. 11, at 21. In *Joslyn v. King*, 20 Am. St. R. 656, a letter-carrier recovered against the clerk of an hotel the value of a registered letter directed to a guest at the hotel, and lost through the negligence of the clerk to whom the letter-carrier had delivered it, and the value of which the letter-carrier was compelled by the department to pay. What duty—a legal one—there was by the clerk to the letter-carrier, is not obvious and is not made so by the report. Was the clerk the letter-carrier's gratuitous bailee? Even if he were, the negligence does not appear to have been gross. *Ante*, 286.

³ 32 L. J. Ex. 171.

⁵ 32 L. J. Ex. 171.

⁴ 20 Am. St. R. 333.

⁶ *Ante*, 1035 n. ⁶, 1039.

for getting the same from the railway authorities, the traveller is thereby so far constituted a guest as to render the proprietor liable for the safe keeping or re-delivery of the baggage. The liability of the proprietor, it was said, commences from the time of the delivery of the baggage or check to the porter, and no private arrangement between a landlord and carrier for the transportation of persons can make any difference.

The decision is a convenient one and not unlikely to be followed; still, it is doubtful whether it is in its full extent the natural development of sound principle. Where the arriving traveller has previously secured rooms, no other conclusion seems called for. The contract of host and guest has before been constituted, and the baggage is delivered to the host's servant for the purposes of the contract. Where, however, the journey to the hotel is a speculative one on the part of the traveller as to whether rooms are available or not, no contract with the innkeeper is made till the fact of the landlord having appropriate accommodation is ascertained, apart from contract. No common law duty arises if the innkeeper has in fact no accommodation. The liability, it may be suggested, is referable to the fact that the innkeeper professes, through his porter, to carry between his inn and the station in such a manner as to constitute himself a common carrier. Though the general position is clearly unsustainable, that a mere commendation by the servant of the innkeeper, acting within the scope of his authority, of a particular line of vehicles plying between his master's inn and some other terminus will fix the master with liability for loss during the transit, yet where the conveyance is the innkeeper's and he makes a profession of carrying between a railway station or landing-place and his inn, he is probably liable, as common carrier, to those who are conveyed by him, for any loss of their luggage in his charge which they suffer on the journey. If the conveyance, as in the case now under consideration, is not the innkeeper's and while primarily employed in conveying guests to the inn, secondarily undertakes a more general conveyance of passengers, the liability of the innkeeper for the act of his porter would seem in principle limited to his negligent act, and not to be an absolute liability; on the ground that the services of the porter, though rendered with a view to the constitution of the relation of innkeeper and guest are yet rendered independently of and antecedently to the constitution of any such relation. The case differs from that of the conductor of an omnibus assisting a passenger to enter. There the act of the conductor is in performance of the duty for which he is engaged, and is an

Coskery v. Nagle considered.

acceptance of the passenger and a representation that there is accommodation in his vehicle. In the case of the porter he has no authority to constitute the relation of host and guest; he is no more than an advertising medium, and the relation is subsequently made when the traveller's requirements are made known at the inn to the person in charge.

Angus v.
M'Lachlan.

A remark of Kay, J., in *Angus v. M'Lachlan*,¹ has been noticed² as "inaccurate," as reported, "in attributing to the learned judge a view which is clearly inconsistent with the authorities." The passage referred to is as follows: "The general law was that a bailee, such as an innkeeper, was not bound to be more careful in keeping the goods of his guests than he was as to his own." A perusal of the case will show that the defendant claimed a lien and detained goods, which he locked up with his own, after the plaintiffs had left the hotel. They subsequently were found to be damaged by moths and mice. The possession of the innkeeper was not a possession of a guest's goods during the existence of the relation of host and guest between them; his possession was by way of lien, after the relation of host and guest had terminated, to which the innkeeper was entitled by law as innkeeper if, as was the case, his bill was not paid. That being so, reference was to be had to principles governing in the case of an innkeeper's lien, which are as well recognized as the different principles governing in the relation of host and guest. The only point Kay, J., had to decide was the duty of an innkeeper or any other ordinary bailee entitled to lien when holding goods in exercise of lien. And his decision as to this, that the only diligence the innkeeper in such circumstances was bound to use was the diligence that an average prudent business man would use with his own goods,³ seems sound in principle, and not open to any just exception.

The Inn-
keepers' Li-
ability Act 1863,
26 & 27 Vict.
c. 41.
Liability
limited to £80.

The liabilities of innkeepers have been diminished by an Act passed in 1863, "respecting the liability of innkeepers, and to prevent frauds on them."⁴

By section 1 of this Act, no innkeeper shall be liable to make good any loss or injury to goods or property brought to his inn, not being a horse or other live animal, or any gear appertaining thereto, or any carriage, to a greater amount than £30, except (1) where such goods or property shall have been stolen, lost, or injured through the wilful⁵ act, default, or neglect of

¹ 23 Ch. D. 330, at 336.

² 1 Sm. L. C. (9th ed.), 141.

³ See *ante*, 910.

⁴ The Innkeepers' Liability Act 1863 (26 & 27 Vict. c. 41).

⁵ "Wilful" applies to "act" only: *Squire v. Wheeler*, 16 L. T. (N. S.) 93.

such innkeeper, or any servant in his employ; (2) where such goods or property shall have been deposited expressly for safe custody with such innkeeper; provided that in the case of such deposit they may require as a condition of their liability that the goods or property shall be deposited in a box or other receptacle fastened and sealed by the person depositing the same.

By section 2 innkeepers are not to have the benefit of the Act in respect of property which they refuse to have for safe custody, or which by their default the guest is unable to deposit with them.

Act not to apply where innkeeper refuses to keep property in safe custody.

By section 3 every innkeeper is required to cause at least one copy of section 1 of the Act, printed in plain type, to be exhibited in a conspicuous part of the hall or entrance to his inn, and shall be entitled to the benefit of the Act only in respect of goods or property brought to the inn while the copy is so exhibited.¹

Notice to be exhibited.

By the Innkeepers' Act, 1878,² an innkeeper may sell by public auction goods left with him after six weeks, after giving at least one month's notice of his intention in this way specified in the Act.

The Innkeepers' Act 1878, 41 & 42 Vict. c. 38.

An innkeeper is not bound to provide for his guest the precise rooms he wants. The law only requires him to find for his guests reasonable and proper accommodation; if he does that, he does all that is requisite.³

Duty of innkeeper is no more than to find reasonable and proper accommodation.

There is some doubt whether a guest can maintain proceedings against an innkeeper for refusing to receive him as a guest without a tender of the amount to which the innkeeper would be reasonably entitled for the entertainment furnished to his guest. Lord Abinger, C.B., in *Fell v. Knight*,⁴ expressed the view that it is not sufficient for a plaintiff to allege that he was ready to pay; he should further state that he was willing and offered to pay. In so far, however, as this dictum is inconsistent with the subsequent considered judgment in *Pickford v. Grand Junction Railway Company*,⁵ it is probably not law. In that case the test suggested was that, whenever a duty is cast on a party, in consequence of a contemporaneous act of payment, to be done by another, it is

Fell v. Knight.

Pickford v. Grand Junction Railway Company.

¹ *Spice v. Bacon*, 2 Ex. D. 463, 36 L. T. (N. S.) 896. On the point for which this case was previously cited it is only reported in the *Law Times*. *Hodgson v. Ford*, 8 Times L. R. 722, (C.A.); *Huntly v. Bedford Hotel Company, Limited*, 7 Times L. R. 641 (C.A.); *Carey v. Long's Hotel Company*, 7 Times L. R. 213 (C.A.). In Pennsylvania, under the local Act there, it has been decided that if actual knowledge of the place to deposit valuables has been brought home to the guest, it is immaterial whether the provisions of the Act as to the posting of notices in certain places have been complied with. Where constructive notice is relied on, the terms of the Act must be strictly complied with: *Schultz v. Wall*, 134 Pa. St. 262, 19 Am. St. R. 686.

² 41 & 42 Vict. c. 38.

³ *Fell v. Knight*, 8 M. & W. 269.

⁴ 8 M. & W. 269. On the other hand, *Rex v. Ivens*, 7 C. & P. 213, per Coleridge, J.

⁵ 8 M. & W. 372.

sufficient if the one pay, or be ready to pay, the money when the other is ready to undertake the duty.

Innkeepers' lien.

As we have already incidentally seen,¹ an innkeeper is entitled to a lien for his charges.² This lien attaches to the goods brought to the inn by the guest, though not to the person of his guest, nor to the apparel he is actually wearing;³ and avails against any goods the guest has with him, even though they are not his own.⁴ The reason of this is because the innkeeper has to receive the guest and his goods without inquiries into his title to them.⁵ Consequently the innkeeper's lien attaches to the goods immediately on their coming into his inn to the extent of the innkeeper's lawful charges against his guests.⁶ Thus, if the goods had been stolen by the guest and then brought to the inn, the innkeeper's lien would attach, unless bad faith could be shewn in the innkeeper,⁷ or knowledge that the goods are not the guest's goods and sent to the inn for a specific purpose.⁸ Much more then does it attach to all the luggage that is brought to an hotel where husband and wife stay, and credit is given to the husband while the luggage they have with them is mainly the wife's separate estate.⁹

Servant robbed.

If a servant or agent is robbed of his master's money or goods the master may maintain the action against the innkeeper in whose house the loss was sustained. In *Bedle v. Morris*¹⁰ it was moved in arrest of judgment "that the action did not lie for the master on the robbery of the servant. But *non allocatur*; for none can have satisfaction but he who has the loss, and the loss is to the master." "Moreover, it is not material whether he was his servant or not; for if he was his friend by whom the party sent the money and he is robbed in the inn, the true owner shall have the action. *Per totam Curiam*. And judgment given accordingly."¹¹

¹ *Angus v. M'Lachlan*, 23 Ch. D. 330.

² As to lien see *Kruger v. Wilcox*, Amb. 252, Tudor, L. C. Mercantile Law (3rd ed.), 353 *cum notis*; *Chase v. Westmore*, 5 M. and S. 180, Tudor, L. C. Mercantile Law (3rd ed.), 356 *cum notis*.

³ *Sunbolt v. Alford*, 3 M. & W. 248. See *Newton v. Trigg*, 1 Show. (K. B.), (Case 166), 268, *ante* 1028.

⁴ *Turrill v. Crawley*, 13 Q. B. 197; *Snead v. Watkins*, 1 C. B. N. S. 267; *Threfall v. Borwick*, L. R. 7 Q. B. 711, L. R. 10 Q. B. 210; *Mulliner v. Florence*, 3 Q. B. Div. 484; *Bacon, Abr. Inns and Innkeepers* (D).

⁵ *Snead v. Watkins*, 1 C. B. N. S. 267.

⁶ *Smith v. Dearlove*, 6 C. B. 132.

⁷ *Johnson v. Hill*, 3 Stark. (N.P.), 172.

⁸ *Broadwood v. Granara*, 10 Ex. 417, limiting the lien to "goods brought by a guest to an inn."

⁹ *Gordon v. Silber*, 25 Q. B. D. 491.

¹⁰ *Yelv.* 162, S. C. *sub nom.* *Beedle v. Morris*, 1 Cro. (Jac.) 224.

¹¹ See *Bac. Abr. Inns and Innkeepers* (C), 5. *Berkshire Woollen Company v. Proctor*, 61 Mass. 417. See *ante*, 901.

CHAPTER II.

COMMON CARRIERS.

GENERAL CONSIDERATIONS.

WE have already noted the definition of a common carrier in Definitions. discriminating a common carrier from a private carrier for hire.¹ We shall now find on a closer investigation that the *differentia* indicated by Alderson, B., in *Ingate v. Christie*²—of carrying for all persons indifferently and not for a particular person—is that most generally accepted.

Thus Story says:³ “A common carrier has been defined Story, to be one who undertakes for hire or reward to transport Bailments. the goods of such as choose to employ him from place to place;”⁴ and Redfield:⁵ “To constitute one a common carrier Redfield, he must make that a regular and constant business, or at all Carriers. events he must, for the time, hold himself ready to carry for all persons indifferently who choose to employ him.”

In *Dwight v. Brewster*,⁶ Parker, C.J., defines a common carrier Parker, C.J., as “one who undertakes, for hire or reward, to transport the in *Dwight v. Brewster*. goods of such as choose to employ him, from place to place. This may be carried on at the same time with other business.”

In *Fish v. Chapman*,⁷ Nisbit, J., said: “To constitute a man a Fish v. common carrier, the business of carrying must be habitual and Chapman.

¹ *Ante*, 1022.

² 3 C. & K. 61.

³ Bailm. § 495.

⁴ See the full judgment of Story, J., in *Citizens' Bank v. Nantucket Steamboat Company*, 2 Story, Rep. (U. S.) 16, the learned judge says, at 35, “it is not necessary that the compensation should be a fixed sum, or known as freight; for it will be sufficient if a hire or recompense is to be paid for the service, in the nature of a *quantum meruit*, to or for the benefit of the carrier.”

⁵ Carriers, § 19, citing *Giabourn v. Hurst*, 1 Salk. 249 (the definition in which case is said by Gibson, C.J., in *Gordon v. Hutchinson*, 1 W. & S. (Pa.), 285 at 286, to be the “best definition of a common carrier”; it is, “any man undertaking for hire to carry the goods of all persons indifferently.” This definition is also approved in *Allen v. Sackrider*, 37 N. Y. 341; cp. *Gilbart v. Dale*, 5 A. & E. 543, where defendant was held to be not a carrier but keeper of a booking office.

⁶ 18 Mass. 50, at 53.

⁷ 2 Kelly (Ga.) 349, cited in judgment of Brett, J., in *Nugent v. Smith*, 1 C. P. D. at 27. Nisbit, J.'s, judgment is set out in Story, Bailm. (8th ed.) § 495, n. 3.

not casual. The undertaking must be general and for all people indifferently. He must assume to be the servant of the public; he must undertake for all people."

Ware, J., in *The Huntress*.

Ware, J.'s,¹ description is to the same effect, though he states his meaning more fully; thus: "A common carrier is one who makes it a business to transport goods either by land or water, for hire, and holds himself ready to carry them for all persons who apply and pay the hire. Undertaking, as he does, to carry goods for all persons, he is considered as engaged in a public employment and as engaging beforehand to carry goods for a reasonable remuneration for any person who may apply to him and pay the hire, and he will be liable to an action for refusing, unless he has a reasonable cause for his refusal."

Bell, in *Principles of the Law of Scotland*.

Bell, in his *Principles of the Law of Scotland*,² defines a common carrier as "one who, for hire, undertakes the carriage of goods for any of the public indiscriminately from and to a certain place."

Lastly, Brett, J., in *Nugent v. Smith*,³ says: "The real test of whether a man is a common carrier, whether by land or water, therefore really is, whether he has held out that he will, so long as he has room, carry for hire the goods of every person who will bring goods to him to be carried. The test is not whether he is carrying on a public employment, or whether he carries to a fixed place;⁴ but whether he holds out, either expressly or by a course of conduct, that he will carry for hire, so long as he has room, the goods of all persons indifferently who send him goods to be carried. If he does this, his first responsibility naturally is, that he is bound, by a promise implied by law, to receive and carry for a reasonable price the goods sent to him upon such an invitation."

No obligation to equality of treatment at common law.

At common law a common carrier of goods is under no obligation to treat all customers equally. His obligation is to accept and carry all goods delivered to him for carriage according to his profession on being paid a *reasonable* compensation for so doing. If the carrier refuses to carry the goods, failing some reasonable excuse for not carrying them, an action lies against him. There

¹ *The Huntress*, Davis, (U. S. Adm.) 82, at 86.

² § 160. In Guthrie's Edition, (9th ed.) 110, after the word "goods" the words "generally, or of certain classes of goods," are added.

³ 1 C. P. D. 19, at 27. On this point the judgment is unaffected by the judgment of Cockburn, C.J., in the same case in the Court of Appeal, 1 C. P. Div. 423.

⁴ Cp. *Brind v. Dale*, 8 C. & P. 207, with Story's comment, *Bailm.* § 496, n. 3; also the judgment in *Robertson v. Kennedy*, 2 Dana (Ky.) 430: "According to the most approved definition, a common carrier is one who undertakes, for hire or reward, to transport the goods of all such as choose to employ him from place to place. Draymen, cartmen, and porters who undertake to carry goods for hire as a common employment from one part of the town to another, come within the definition; so also does the driver of a slide with an ox-team. The mode of transportation is immaterial."

is, however, nothing in the common law to hinder a carrier from carrying for favoured customers at any unreasonably low rate, or even gratis; the only limitation is that he must not charge more than is reasonable.¹ With railway companies, it may be observed, the law is otherwise by statute.²

A common carrier differs from a forwarding merchant in that a forwarding merchant has no concern in the vehicle by which goods are sent, nor in the freight, and engages merely to cause goods to be forwarded to their destination for reward;³ and he differs from a warehouseman in that the warehouseman engages merely for custody and not for transport.⁴ Waggoners and teamsters;⁵ coach-masters or proprietors of stage coaches (when they usually carry for all persons indifferently);⁶ railway companies, for goods which they profess to carry or actually carry;⁷ carmen and porters who undertake to carry goods for hire from one part of a town or city to another;⁸ lightermen, hoymen,⁹ barge-owners, ferrymen,¹⁰ canal boatmen, and the owners and masters¹¹ of ships and steamboats engaged in the transportation of goods for persons generally for hire—all these to the extent that they profess or are compelled to carry, are included under the designation of common carriers.¹²

How common carrier differs from (i.) a forwarding merchant; (ii.) warehousemen.

Who are common carriers.

¹ Great Western Railway Company v. Sutton, L. R. 4 H. L. 226.

² The Railways Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20), s. 90.

³ Angell, Carriers (5th ed.), § 75. Cp. Gilbert v. Dale, 5 A. & E. 543. *Ante*, 1019.

⁴ Story, Bailm. §§ 444-454. *Ante*, 997.

⁵ 2 Kent, Comm. 598, 599; Gisbourn v. Hurst, 1 Salk. 249; Hyde v. Trent and Mersey Navigation Company, 5 T. R. 389.

⁶ Dwight v. Brewster, 18 Mass. 50; Middleton v. Fowler, 1 Salk. 282; Story, Bailm. § 500.

⁷ Palmer v. Grand Junction Railway Company, 4 M. & W. 749; Crouch v. London and North-Western Railway Company, 14 C. B. 255; Thomas v. Boston and Providence Railroad Corporation, 51 Mass. 472.

⁸ Story, Bailm. § 496.

⁹ Rich v. Kneeland, 2 Cro. (Jac.) 330; Dale v. Hall, 1 Wils. (C. P.) 281.

¹⁰ Willoughby v. Horridge, 12 C. B. 742.

¹¹ Morse v. Slue, 2 Lev. 69, where it was admitted that the action lay equally against the masters and owners of vessels. This was afterwards decided by Lord Hardwicke, in Boucher v. Lawson, Cas. temp. Hardw. 85, 194. This doctrine has been since recognized in Goff v. Clinkard, cited 1 Wils. (C. P.), 282, and applies equally to the carrier of goods in the coasting trade, Dale v. Hall, 1 Wils. (C. P.) 281, and to a bargeman and hoymen upon a navigable river, Rich v. Kneeland, 2 Cro. (Jac.) 330. In Varble v. Bigley, 29 Am. R. 435, it was said that the owner of a tow-boat is not a common carrier, dissenting from the Louisiana Courts. See the judgment for an examination of the principles to be applied to the determination of this question. In Transportation Line v. Hope, 95 U. S. (5 Otto) 297, it was held that the towing a barge in conjunction with thirty or forty others did not constitute the towing company a common carrier, since there was not that exclusive control of the barge which that relation would imply. Yet such a company was "to exercise a careful and skilful judgment" in furnishing the motive power, in selecting a proper position for the barge, in causing her to be lashed suitably, and in the general regulation of her movements.

¹² Angell, Carriers (5th ed.), §§ 67-90. In Loup v. Wabash, &c., Railway Company, 56 Am. R. 374, it was held that a railway company contracting to transport a menagerie in cars owned and controlled by the owner of the menagerie, is not liable as a common carrier; and this on the ground that "the duty to receive cars of other persons, when existing, is usually fixed by the railroad laws, and not by the common law. But it is not incumbent on companies, in their duty as common-carriers, to move

Roman law.

By the Roman law carriers were held to the most exact diligence, because they might reject or receive the goods tendered to them for carriage at their option.¹ If they received anything, they were liable, whether they received in person or by the master of the vessel, or supercargo, or other person whatsoever to whom the things were given in charge, provided that they were authorized to receive goods in the way of business.² By the same law, however, the carriers' (*vectores* or *viatores*) liability stopped short of inevitable damage (*damnum fatale*).³

Special liability of a carrier by the Roman law only in the case of water carriers.

The special liability of a carrier by the Roman law existed only in the case of water carriers. "It is," says Cockburn, C.J.,⁴ "a misapprehension to suppose that the law of England relating to the liability of common carriers was derived from the Roman law; for the law relating to it was first established by our Courts with reference to carriers by land, on whom the Roman law, as is well known, imposed no liability, in respect of loss, beyond that of other bailees for reward."

Liability of carrier by water in English law, how derived.

Historically, the liability of a carrier by water in English law is derived from the liability of land carriers; this is pointed out by Cockburn, C.J., in the course of the same judgment,⁵ which has already been quoted. "As matter of legal history, we know that the more rigorous law of later times, first introduced during the reign of Elizabeth, was, in the first instance established with reference to carriers by land, to whom by the Roman law no such liability attached. It was not till the ensuing reign, in the eleventh of James I., that it was decided, in *Rich v. Kneeland*,⁶

such cars except in their own routine. They are not obliged to accept and to run them at all times and seasons, and not in the ordinary course of business." An "express company" is defined in *Pacific Express Company v. Seibert*, 142 U. S. (35 Davis) 339. Evidence that at the door of a booking-office there is a board on which is painted "conveyances to all parts of the world," and a list of names of places, is not sufficient proof that the owner is a common carrier: *Upston v. Slark*, 2 C. & P. 598.

¹ *Est in ipsorum arbitrio, ne quem recipiant*; D. 4, 9, 1, § 1. *Ante*, 1033.

² D. 4, 9, 1, § 2.

³ *Nisi si quid damno fatali contingit*: D. 4, 9, 3, § 1. Among *damna fatale* were reckoned losses by shipwreck, by lightning, or other casualty, by pirates, and by *vis major*. Losses by fire, burglary, and robbery, come also under this head, but not theft; *qui saluum fore recepit, non solum à furto, sed etiam à damno recedere videatur*: D. 4, 9, 5, § 1. Under the Code Civil, common carriers are not liable for losses resulting from superior force, such as robbery, arts. 1782, 1784, 1929, 1953. In Scotland, loss by fire was regarded in ordinary cases as *damnum fatale*, but robbery is not: 1 Bell, Comm. (7th ed.) 499. The case as to fire seems somewhat doubtful, since Bell says, at 500, "It has, on the whole, appeared in Scotland that this responsibility for fire is not to be held within the true principle of the edict as adopted by us. It is rather considered as a *damnum fatale*, an inevitable accident, for which the carrier, &c., are not responsible." The law, however, is altered by statute; The Mercantile Law Amendment Act 1856 (Scotland), 19 & 20 Vict. c. 60, s. 17, making all carriers for hire of goods within Scotland liable to make good to the owner of such goods all losses arising from accidental fire while such goods were in the custody or possession of such carriers. See Smith, Merc. Law (10th ed.), 304 and note.

⁴ *Nugent v. Smith*, 1 C. P. Div. 423, at 428.

⁵ L. c. at 430.

⁶ 2 Cro. (Jac.) 330, Hob. 17.

that the common hoyman or carrier by water stood on the same footing as a common carrier by land, and rightly, for in principle there could be no difference between them." From this time, accordingly, it has been held that there is no distinction, as far as general principle goes, between a land-carrier and a water-carrier,¹ though there are particular developments of principle in each case that require separate consideration.

In the *Liver Alkali Company v. Johnson*² it was contended that the character of a common carrier was not constituted unless he held himself out as plying between particular places, or held himself out to go to some particular place and to take all goods brought him for the voyage. In that case the defendant was a barge-owner, and let out his vessels for the conveyance of any goods to any customers who applied. The termini were not fixed, but were determined in each case by the customer. The majority of the Court (Blackburn, J., delivered the judgment) were of opinion that the defendant "has the liability of a common carrier;" though they did not "think it necessary to inquire whether the defendant" is "a carrier so as to be liable to an action for not taking goods tendered to him."³ Brett, J., who dissented, was of opinion⁴ that the defendant "was not a common carrier," "because he does not undertake to carry goods for or to charter his sloop to the first comer. He wants, therefore, the essential characteristic of a common carrier; he is, therefore, not a common carrier, and therefore does not incur at any time any liability on the ground of his being a common carrier."

The decision in *Liver Alkali Company v. Johnson* was mainly relied on by the plaintiff in *Scaife v. Farrant*,⁵ also in the Exchequer Chamber. The defendant was the agent of a railway company for collecting and delivering goods and parcels; he further carried on upon his own account the business of a carrier, removing goods and furniture for hire for all persons who applied to him, and in his own vans. Generally the van or vans were hired by, and filled with the goods of, one person only. The plaintiff made an agreement with the defendant to remove his furniture, the defendant "undertaking risk of breakage (if any) not exceeding £5 on any one article." While the furniture was being removed, it was burned, without negligence on the defendant's part. The plaintiff contended that *Liver Alkali Company v. Johnson*⁶ established that the defendant was a common

¹ *Trent Navigation v. Wood*, 3 Esp. (N. P.) 127.

² (1874) L. R. 9 Ex. 338; cp. *Flautt v. Lashley*, 36 La. Ann. 106.

³ L. R. 9 Ex. at 340.

⁴ *L. c.* at 343.

⁵ L. R. 9 Ex. 338.

⁶ (1875) L. R. 10 Ex. 358.

carrier, and so liable. But the Exchequer Chamber held that the facts shewed the plaintiff to have entered into a special contract, by the terms of which he was bound; and the fair construction of the agreement was that the defendant was willing to undertake a particular casualty and no other. Cockburn, C.J., intimated an opinion that the question of what constitutes a common carrier "ought to be submitted to further consideration."¹

Nugent v.
Smith.
Cockburn,
C.J.'s.

In the following year, in *Nugent v. Smith*,² in the Court of Appeal, Cockburn, C.J., examined into the authorities. After noting that the Court of Appeal was bound by the judgment in *Liver Alkali Company v. Johnson*,³ he thus expressed his own opinion: "I cannot help seeing the difficulty which stands in the way of the ruling in that case, namely, that it is essential to the character of a common carrier that he is bound to carry the goods of all persons applying to him, while it never has been held, and, as it seems to me, could not be held, that a person who lets out vessels or vehicles to individual customers on their application was liable to an action for refusing the use of such vessel or vehicle if required to furnish it. At all events, it is obvious that, as the decision of the Court of Exchequer Chamber proceeded on the ground that the defendant in that case was a common carrier,⁴ the decision is no authority for the position taken in the court below, that all shipowners are equally liable for loss by inevitable accident."

Criticized.

From this passage it may be gathered that Cockburn, C.J., viewed the judgment of Blackburn, J., in *Liver Alkali Company v. Johnson*, as introducing other than the accepted elements into the definition of a common carrier. It may, however, be remarked that in the Court of Exchequer, in *Liver Alkali Company v. Johnson*, judgment was given on the ground that the defendant was within the terms of Story's definition of a common carrier, and exercised a public employment "by means of numerous vessels, which he let to any one who chose to hire them."⁵ If

¹ L. R. 10 Ex. at 366.

² (1876) 1 C. P. Div. 423. In this case Cockburn, C.J., cites Parsons' definition of common carrier (at 427)—"One who offers to carry goods for any person between certain termini and on a certain route. He is bound to carry for all who tender to him goods and the price of carriage, and insures these goods against all loss but that arising from the act of God or the public enemy, and has a lien on the goods for the price of the carriage." "If either of these elements is wanting, we say the carriage is not a common carrier, either by land or by water." *Avinger v. South Carolina Railway Company*, 13 Am. St. R. 716, is an action against a common carrier for refusing to carry goods tendered to him.

³ L. R. 9 Ex. 338.

⁴ 1 C. P. Div. at 433.

⁵ The decision scarcely goes so far as that; only that he had "the liability of a common carrier," to the exclusion of the question as to whether he would "be liable to an action for not taking goods tendered to him": per Blackburn, J., L. R. 9 Ex., at 340.

⁶ Per Kelly, C.B., L. R. 7 Ex. 267, at 269.

the judgment of the majority of the Exchequer Chamber could be limited to the affirmance of this, no difficulty would arise. Yet it must be admitted that there are expressions in the judgment indicating that the defendant was exercising a public employment, and which lead to the inference that the carrying on the business of letting vehicles for the carriage of particular goods is in law a carrying on a public employment, and consequently, an exercise of the business of a common carrier.¹ At any rate, even if this be so, the nominal definition of a common carrier need not be disturbed, though the notion of what is comprehended under it may require to be extended. If it be not so, then the view of Cockburn, C.J., appears to state the law, and the decision in *Liver Alkali Company v. Johnson* must be explained on the facts found by the jury, without any wider application.

Another branch of a common carrier's business is to carry passengers for hire. This is a development of much later date than his obligation to carry goods. For the first case reported in which it was sought to recover damages by a person for an injury done to him as a passenger was tried before Lord Kenyon in 1791, and reported in Peake's *Nisi Prius* Cases, 81, in 1795.² The liability arising from the undertaking to carry passengers differs from that with regard to goods, and must be independently considered.

A common carrier, it has been said, differs from a private carrier,³ first, in respect of duty; secondly, in respect of risk.⁴

First, in respect of duty.

A common carrier exercises a public employment,⁵ in which he consequently has public duties to perform, so that he cannot, like an ordinary tradesman or mechanic, receive or reject a customer at pleasure, or charge any price that he chooses to demand. If he refuse to receive goods and to carry them according to the course of his particular employment, and has no sufficient excuse for what he thus does, he will be liable to an action. But he cannot be sued in assumpsit for not carrying safely where no rate is fixed by law; for in such a case the carrier is entitled to

Common carrier to carry passengers.

Distinction between common carrier and private carrier.

Duty of common carrier.

¹ Cp. *Coggs v. Bernard*, 2 Ld. Raym. 909, 1 Sm. L. C. (9th ed.), 201; *Ingate v. Christie*, 3 C. & K. 61; *Ansell v. Waterhouse*, 2 Chit. (K.B.) 1.

² *White v. Boulton*, Peake (N. P.), 81; referred to by Hubbard, J., in *Ingalls v. Bills*, 50 Mass. 1, at 8.

³ Angell (5th ed.), Carriers, § 67.

⁴ Cp. Code Civil, art. 1754; *Erakine, Institutes*, Bk. 3, tit. 1, 28.

⁵ "If a man takes upon him a public employment, he is bound to serve the public as far as the employment extends, and for refusal an action lies," *Lane v. Cotton*, 1 Ld. Raym. 646, per Holt, C.J., at 654; per Paston, J., Y. B. 14 H. VI. 18 pl. 58; cp. Y. B. 19 H. VI. 49, pl. 5, with Y. B. 21 H. VI. 55, pl. 12, and Y. B. 48 E. III. 6, pl. 11. "It is the duty of every artificer to exercise his art rightly and truly as he ought," *Fitzh. De Nat. Brev.* 94 D.

say on what terms he will carry, and is not obliged to take everything which is brought to his warehouse unless the terms on which he chooses to undertake the risk are complied with by the person who employs him.¹ At the same time, a common carrier may only require reasonable compensation for his services, and for the risks that they draw with them. Moreover, at common law he is under no obligation to treat all customers equally; still if the customer, in order to induce the carrier to perform his duty, paid under protest a larger sum than was reasonable, he might recover back the surplus beyond what the carrier was entitled to receive, in an action for money had and received, as being money extorted from him.²

Carrier said
to be liable
"in respect
of his reward."

It has been said³ that the carrier is liable in respect of his reward, and this view has the sanction of Sir Edward Coke, who says: "He hath his hire, and thereby implicitly undertaketh the safe delivery of the goods delivered to him."⁴ High though the authority of Coke, C.J., or Holt, C.J., singly, is, and in conjunction almost irresistible, in this case the law has been settled in a way contrary to that indicated by them. For example, in *Forward v. Pittard*,⁵ Lord Mansfield, C.J., said: "It appears from all the cases for a hundred years back that there are events for which the carrier is liable independent of his contract. By the nature of his contract, he is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm, that is, by the common law a carrier is in the nature of an *insurer*,"⁶ While Holroyd, J., said in *Ansell v. Waterhouse*,⁷

Lord Mans-
field, C.J., in
Forward v.
Pittard.

¹ — *v. Jackson, Peake*, Add. Cas. 185; see also Lord Kenyon's ruling as to common law duty, and the remark by Parke, B., as to innkeepers, in *Johnson v. Midland Railway Company*, 4 Ex. 367, at 371. "A man may keep an inn for those persons only who come in their own carriages." This was in answer to an argument of counsel that a company, having chosen to be carriers, can no more select the goods they will carry, than an innkeeper his guests.

² Per Blackburn, J., in *Great Western Railway Company v. Sutton*, L. R. 4 H. L. 226, at 237, and the fact of charging less to one is evidence that the greater charge is unreasonable: *Baxendale v. Eastern Counties Railway Company*, 27 L. J. C. P. 137, at 145; and it may be recovered at common law even when not paid under protest: *Parker v. Great Western Railway Company*, 7 M. & G. 253; *Edwards v. Great Western Railway Company*, 11 C. B. 588; *Heiserman v. Burlington, &c. Railway Company*, 63 Iowa 732.

³ *Bac. Abr. Carriers (B)*, *Riley v. Horne*, 5 Bing. 217; *Morse v. Slue*, Sir T. Raym. 220; 1 Vent. 238, per Hale, C.J.; *Lane v. Cotton*, 1 Salk. 143.

⁴ *Co. Litt.* 89 a. To this Mr. Hargrave appends a note: "The *hire* is not the *only* or *principal* ground, on which the carrier is liable; for factors, though they also receive a reward, are not so, except for *negligence* or by reason of a special undertaking. The great cause of the laws charging the carrier is the *public employment* he exercises." In *Morse v. Slue*, 1 Vent. 238, Hale, C.J., is reported as saying: "Then the first reason wherefore the master is liable is, because he takes a reward; and the usage is, that half wages is paid him before he goes out of the country."

⁵ 1 T. R. 27.

⁶ *Op. Hide v. Proprietors of Trent Navigation*, 1 Esp. (N. P.) 36, per Lord Kenyon, C.J.: "where a man is bound to any duty, and chargeable to a certain extent by the operation of the law, in such case he cannot by any act of his own discharge himself."

⁷ 2 Chitty (K.B.) 1, at 4.

a carrier's case: "This is an action against a person who, by ancient law, held as it were a public office, and was bound to the public." "This action is founded on the general obligation of the law and *ex delicto* for acting against it." Lastly, in the case of *Tattan v. Great Western Railway Company*,¹ a case on costs, and therefore keenly contested, Blackburn, J., said: "*Marshall v. York, Newcastle, and Berwick Railway Company*"² is a distinct decision that it [an action against a common carrier 'for the breach of his duty to carry goods safely'] is in substance no less than in form an action on the case. The defendants there were held liable to the plaintiff, a servant travelling on their line with his master, who paid his fare, for the loss of his luggage; although not only was the declaration not framed on a contract, but there was no contract with the plaintiff on which it could have been framed. That is a conclusive authority that a common carrier is liable to an action for a breach of the duty imposed on him by the custom of the realm, apart from any considerations of contract."

Tattan v. Great Western Railway Company.

It is, however, at the option of every man whether he becomes a common carrier or not; if he does, he may limit his profession in what manner he pleases, and may fix what prices he chooses to charge.³ By the common law as it stood before the Carriers' Act, 1830,⁴ as soon as he has entered upon his duties in the

Common carrier may limit his profession in what manner he pleases.

¹ 2 E. & E. 844, at 854. *Tattan v. Great Western Railway* was discussed in *Baylis v. Lintott*, L. R. 8 C. P. 345, and distinguished in the Court of Appeal in *Fleming v. Manchester, Sheffield, and Lincolnshire Railway Company*, 4 Q. B. Div. 81, as being before the County Courts Act (30 & 31 Vict. c. 142), s. 5. See *Kerr v. Midland Great Western Railway*, 10 Ir. C. L. Appendix, XLV.; *Pontifex v. Midland Railway Company*, 3 Q. B. D. 23; *Cohen v. Foster*, 66 L. T. 616.

² 11 C. B. 655. "It seems to me that the whole current of authorities, beginning with *Govett v. Radnidge* (3 East 62), and ending with *Pozzi v. Shipton* (8 A. & E. 963), establishes that an action of this sort is in substance, not an action of contract, but an action of tort against the company as carriers." "The earliest instance I find of an action of this sort is in Fitzherbert's *Natura Brevium*, Writ de Trespass on the Case, in which it is said (94 D.): 'If a smith prick my horse with a nail, &c., I shall have an action upon the case against him without any warranty by the smith to do it well; for it is the duty of every artificer to exercise his art rightly and truly as he ought.' There is no allusion there to any contract": per Williams, J., at 663. In *Y. B. 14 H. VI. 18*, pl. 58, the law is laid down in accordance with Fitzherbert. Compare the case mentioned by Willes, J., in the opening passage of his judgment in *British Columbia Saw Mill Company v. Nettleship*, L. R. 3 C. P. 499, at 508. In *Buddle v. Willson*, 6 T. R. 369, 202, it is laid down on the authority of Denison, J., in *Dale v. Hall*, 1 Wils. (K.B.) 281, at 282, that in the ordinary case of an action against a common carrier, the cause of action is *ex contractu*. Then came the judgment of the King's Bench in *Govett v. Radnidge*, 3 East 62. Cp. *Weall v. King*, 12 East 452. Sir J. Mansfield, C.J., delivering the judgment of the Common Pleas in *Powell v. Leyton*, 2 B. & P. (N. R.) 365, re-affirmed the principle of *Buddle v. Willson*. Dicey, *Parties to an Action*, 20, is of the same opinion. See note to *Buddle v. Willson*, 3 Rev. R. 206, and *Bullen and Leake*, *Proc. of Plead.* (3rd ed.), 708. *Powell v. Leyton* is considered in *Ansell v. Waterhouse*, 2 Chitty (K.B.) 1. The Queen v. McLeod, 8 Can. S. C. R. 1, should also be referred to, especially the judgment of Fournier, J., 45-54. See *ante*, 884 *et seqq.*, 921 n. ³, and *post*, 1144.

³ *Smith v. Horne*, 8 Taunt. 144; see per Bayley, J., *Garnett v. Willan*, 5 B. & Ald. 53, at 57; *Wyld v. Pickford*, 8 M. & W. 461; *Hinton v. Dibbin*, 2 Q. B. 646; *Thorogood v. Marsh*, Gow (N. P.) 105, at 107.

⁴ 11 Geo. IV. & 1 Will. IV. c. 68. The Canadian Law as to custody of goods may

manner and under the regulations that he may have chosen to prescribe to himself, so long as he professes to carry on his business he is bound to receive goods (and passengers if they are within the limits of his profession) and carry them for a reasonable reward,¹ and according to the route which he holds out to the public, though it is not the shortest or the most convenient;² and he can neither capriciously in a single instance, nor by public notice seen and read by his customer, exonerate himself from the consequences of gross neglect.³ He may choose the kind of conveyance he is to carry in, the times of transit, the mode of delivery, the articles that he will profess to carry, and what price he will have when he shall be paid. His duty to receive is always limited by his convenience and his profession to carry,⁴ although his liability is not limited to England; for if he holds himself out as a carrier to some place without the realm, he becomes liable to an action at the suit of any for whom he may refuse to carry.⁵

Secondly, in respect of risk.

As to risk.
Riley v.
Horne.

The common law with regard to this has been succinctly stated by Best, C.J., in *Riley v. Horne*,⁶ as follows: "We have established these points—that a carrier is an insurer of the goods which he carries; that he is obliged for a reasonable reward to carry any goods to the place to which he professes to carry goods that are offered him, if his carriage will hold them, and he is informed of their quality and value; that he is not obliged to take a package the owner of which will not inform him what are its contents, and of what value they are; that if he does not ask for this information, or if, when he asks and is not answered, he takes the goods, he is answerable for their amount, whatever that may be; that he may limit his responsibility as an

be gathered from *The Merchants' Despatch Transportation Company v. Haleby*, 14 Can. S. C. R. 572.

¹ 2 Kent, Comm. 599; *Harris v. Packwood*, 3 Taunt. 264, at 271; *Pickford v. Grand Junction Railway Company*, 8 M. & W. 372.

² *Hales v. London and North-Western Railway Company*, 4 B. & S. 66. As to sea journeys, *Leduc v. Ward*, 20 Q. B. D. 475.

³ *Riley v. Horne*, 5 Bing. 217, per Best, C.J., at 224; *Smith v. Horne*, 8 Taunt. 144; *Newborn v. Just*, 2 C. & P. 76. But he may by *clear* agreement. *Manchester, Sheffield, and Lincolnshire Railway Company v. Brown*, 8 App. Cas. 703; see *Czech v. General Steam Navigation Company*, L. R. 3 C. P. 14; and *post*, 1078. The effect of mere notice of exceptional circumstances not amounting to an ingredient in the contract of carriage, was considered in *Horne v. Midland Railway Company*, L. R. 8 C. P. 131; *Elbinger Actien-Gesellschaft v. Armstrong*, L. R. 4 C. P. 473; *The Parana*, 2 P. D. 118. *Ashendon v. London and Brighton Railway Company*, 5 Ex. D. 190, is the case of an ambiguous agreement which was held not to be just and reasonable within sec. 7 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31).

⁴ *Jackson v. Rogers*, 2 Show. (K.B.) 327; *Oxlade v. North-Eastern Railway Company*, 1 C. B. N. S. 454; *Johnson v. Midland Railway Company*, 4 Ex. 367.

⁵ *Crouch v. London and North-Western Railway Company*, 14 C. B. 255.

⁶ 5 Bing. 217, at 224.

insurer, by notice, but that a notice will not protect him against the consequences of a loss by gross negligence."¹ This statement has, however, been contradicted in one respect, and expanded in another by subsequent decisions.

(1) Best, C.J.'s, statement of the common law in *Riley v. Horne*, has been contradicted with regard to the alleged right of the carrier to refuse to take a package the owner of which will not inform him of its contents. The Court of Common Pleas considered this point in the case of *Crouch v. London and North-Western Railway Company*,² and were of opinion that, as a general rule of law, it was without "a shadow of authority to sustain that position, except the dictum of Best, C.J., in *Riley v. Horne*; and it is a proposition which in its generality cannot stand the test of reasoning."³ The Court, however, must not be taken to deny that there are cases, as of imperfect packing or fraudulent concealment and the like, where the refusal of information of the contents of a package would, in the event of loss suffered by some casualty, exonerate the carrier from liability. "But," says Maule, J., "to say that the company may in all cases insist upon being informed of the nature and contents of every package tendered to them, as a condition of their accepting it, seems to me to be a proposition that is perfectly untenable." With this the rest of the Court were in accord.⁴

In a celebrated United States case⁵ this point was carefully considered. The plaintiff's premises were greatly injured by an explosion of nitro-glycerine, which was being carried by the defendants without knowledge of its dangerous properties, and in the ordinary way of business. The question raised was whether the innocent owner of the premises had an action against the carrier, who was ignorant of what he was carrying, and not whether the owner of the nitro-glycerine could recover for the loss of the substance. The Supreme Court of the United States were of opinion that notice of the dangerous substance could not be imputed to the defendant, since, if it were, it would involve a right to refuse packages offered for carriage without knowledge of their contents, or a right to inspect the contents as a condition of carriage. On the authority of *Crouch v. London and North-Western Railway Company*⁶ this position is held unsustainable. The only right of the carrier in this

¹ This is laid down in *Doctor and Student*, dial. 2, c. 38.

² 14 C. B. 255.

³ Per Maule, J., at 295.

⁴ Per Jervis, C.J., at 291; Cresswell, J., at 296; Williams, J., at 297.

⁵ The Nitro-glycerine case, 15 Wall. (U. S.) 524; *Cramb v. Caledonian Railway Company*, 19 Rettie 1054.

⁶ 14 C. B. 255, at 291.

(1) Denied as to right of carrier to refuse to take a package. *Crouch v. London and North-Western Railway Company*.

The Nitro-glycerine Case.

respect is to refuse to receive packages offered without being made acquainted with their contents when there is good ground for believing that they contain anything of a dangerous character. When, then, there are no attendant circumstances to awaken suspicion, there is no legal presumption of knowledge, and consequently no liability for the consequences of ignorance.¹

(2) Extended as to liability for amount. Judgment of Parke, B., in Walker v. Jackson.

(2) Again, Best, C.J.'s, statement of the common law, in *Riley v. Horne*, has been expanded with regard to the statement that if, when the carrier "asks and is not answered, he takes the goods, he is answerable for their amount, whatever that might be."² "I take it now to be perfectly well understood, according to the majority of opinions upon the subject," says Parke, B.,³ "that, if anything is delivered to a person to be carried, it is the duty of the person receiving it to ask such questions about it as may be necessary; if he ask no questions, and there be no fraud to give the case a false complexion on the delivery of the parcel, he is bound to carry the parcel as it is. It is the duty of the person who receives it to ask questions; if they are answered improperly so as to deceive him, then there is no contract between the parties; it is a fraud which vitiates the contract altogether."

Facts in Walker v. Jackson.

The facts of the case eliciting these remarks were: A "light four-wheeled phaeton" was delivered to the defendant as carrier; for which the plaintiff paid the regular charge. The carriage was safely placed on the defendant's ferry-boat, and conveyed safely across the river. On commencing to draw it up the slip towards the quay on the other side, the defendant's servants were overpowered by its weight. The carriage ran down into the river, and jewellery and watches, packed in a box under the seat, which much increased its weight, but about which nothing was said, were injured. The Court held that the plaintiff's right of action was unaffected by his failing to disclose the

¹ In *Reg. v. Lister, Dears, & B.* (C. C.) 209, the keeping of large quantities of naphtha near a highway to the danger of the public was held to be an indictable offence, though no fire had taken place. In *Standard Oil Company v. Tierney*, 36 Am. St. R. 595, it was held to be a duty on the shipper of dangerous or explosive substances to notify the carrier of the danger attending the handling of them, and if an injury results to the carrier's servants the shipper is liable for the injury thus sustained. If the carrier has knowledge of the dangerous character of any article he is carrying, there is also a duty on him to notify the fact to all who have to come into contact with it. In *Baldwin v. London, Chatham and Dover Railway Company*, L. R. 9 Q. B. D. 582, at 584, it is said: "It was the duty of the plaintiffs to inform the company at the time, if special care were required in dealing with the rags," the particular goods being carried in that case.

² *Walker v. Jackson*, 10 M. & W. 161. Cp. *Lebeau v. The General Steam Navigation Company*, L. R. 8 C. P. 88, at 97. *Willoughby v. Horridge*, 12 C. B. 742, is the case of injury to a horse landing from a ferry-boat through a defective slip. The first recorded instance of an action on the case was one for overloading a boat, whereby plaintiff's horse perished, Lib. Ass. 22 E. III. 94, pl. 41, summarized in *Reeves, Hist. of the Eng. Law* (2nd ed.), vol. iii. 89.

³ 10 M. & W. at 168, adopted *Lebeau v. The General Steam Navigation Company*, L. R. 8 C. P. 88.

fact of the watches and jewellery being contained in the carriage, and that there was no conflict with the principle asserted in *Gibbon v. Paynton*;¹ for there the action of the plaintiff was misleading to the extent of being actually fraudulent; he put valuable property in an old nail-bag stuffed with hay; while in the present case the plaintiff appeared to have not at all altered his normal mode of travelling. This decision settled the law and the older conflicting cases "have dropped from the books."²

Carriers are "insurers in all cases except in two," says Lord Kenyon in *Hyde v. Trent and Mersey Navigation Company*;³ and in *Thorogood v. Marsh*,⁴ Dallas, C.J., says: "The general law is clear. A common carrier is in every case an insurer against fire." A fire caused by lightning is the only exception;⁵ and even when the destruction of the goods was brought about by a high wind communicating a fire from a distance, the Court of Appeals of the State of New York held the carrier liable.⁶ How the carrier's liability as an insurer is restricted we shall now proceed to discuss, classifying his possible immunity under eight heads.

1. A common carrier is not liable for damage arising from any natural cause which the care and foresight reasonably to be expected from him would not provide against. In law events thus brought about by such operations of nature are designed the acts of God.

In *Coggs v. Bernard*,⁷ speaking of the common carrier, Holt, C.J., in *Coggs v. Bernard*, says: "The law charges the person thus intrusted to carry goods against all events but acts of God and of the enemies of the King. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable." And this is a politick establishment contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon it in that point."

To ascertain what class of losses are to be understood under the

¹ 4 Burr. 2298. *Post*, 1074.

² Per Wright, J., *Shaw v. Great Western Railway Company* (1894), 1 Q. B. 373, at 380.

³ 5 T. R. 389, at 394.

⁴ Gow (N. P.) 105.

⁵ *Gatliffe v. Bourne*, 4 Bing. N. C. 314, 3 M. & G. 643, 11 Cl. & F. 45.

⁶ *Miller v. Steam Navigation Company*, 10 N. Y. 431.

⁷ 2 Ld. Raym. 909, 1 Sm. L. C. (9th ed.), 201.

⁸ See Y. B. 9 E. IV. 40, pl. 22.

Carrier insurer in all cases except two.

Restrictions of carrier's liability.

(1) Act of God.

Holt, C.J., in *Coggs v. Bernard*.

Causa fortuita in the civil law.

term "act of God," it must be borne in mind that the *casus fortuitus*¹ of the civil law—what is termed in the common law inevitable accident—is divided into two classes; the first comprehending those occurrences which are occasioned by the elementary forces of nature unconnected with the agency of man or other cause; the second comprehending those which have their origin, either in whole or in part, in the agency of man, whether through commissions or omissions, nonfeasances or misfeasances, or in any other cause independent of the agency of natural forces. A common carrier is not liable for inevitable accident in the first of these senses, but he is liable in the second;² by the Roman law he was liable in neither.

Forward v.
Pittard.

M'Arthur v.
Sears.

The strictness with which inevitable accident in this second sense is excluded in English law is illustrated by Lord Mansfield, C.J., in *Forward v. Pittard*,³ where he mentions the Gordon riots of 1780 as insufficient to excuse a carrier from delivering goods received in the way of his business. An even stronger case is put by Cowen, J., in *M'Arthur v. Sears*,⁴ who said: "I believe it is a matter of history that inhabitants of remote coasts accustomed to plunder wrecked vessels, have sometimes resorted to the expedient of luring benighted mariners by false lights to a rocky shore. Even such a harrowing combination of fraud and robbery would form no excuse."

Character of
the interven-
tion necessary
to excuse.

What amount and character of intervention by natural agency suffices to bring a loss within the exception of "act of God" has been the subject of considerable difference of opinion. On the one hand, the intervention necessary has been narrowed down to such direct and violent and sudden acts of nature as could not by any amount of ability be foreseen, or, if foreseen, averted.⁵ On the other, a claim has been made to comprehend as well any sudden and entire failure of the wind as any sudden gust of wind

¹ *Casus fortuitus quod fato contingit, cuius diligentissimo possit contingere*, is the definition of the civil law: see Kent, C.J., in *Colt v. M'Mechen*, 6 Johns. (Sup. Ct. N. Y.) 160, at 168; and 3 Kent, Comm. 216. See Colquhoun, *Roman Civil Law*, §§ 1534, 2162. *Casum fortuitum definimus omne quod humano coepto praevideri non potest, nec cui proviso potest resisti. Casus fortuiti varii sunt: velut a vi ventorum, turbine, pluviarum, grandinum, fulminum, aestus, frigoris et similibus calamitatum quae cœlitus immittuntur. Nostri vim divinam dixerunt. Græci θεοῦ βίαι. Item naufragia, aquarum inundationes, incendia, mortes animalium, ruinae ædium, fundorum chasmata, incursum hostium, prædonum impetus. His adde damna omnia, a privatis illata quæ quominus inferrentur nullâ curâ caveri potest: Vinnius, Part. Juris. lib. ii. c. 66, cited by Cockburn, C.J., *Nugent v. Smith*, 1 C. P. Div. 423, at 436. A landslide caused by an ordinary rainfall, is not the "act of God:" *Gleeson v. Virginia Midland Railroad Company*, 140 U. S. (33 Davis) 435.*

² *Forward v. Pittard*, 1 T. R. 27, per Lord Mansfield, C.J., at 34. ³ 1 T. R. 27.

⁴ 21 Wend. (N. Y.) 190, at 198, where, also, the learned judge said: "A man hires his vessel to be repaired by a skillful workman, who makes a rudder apparently sound, but internally rotten, and the loss happens by reason of its breaking, yet he is liable, though ignorant of the defect;" he cites as his authority for this *Blackhouse v. Sneed*, 1 Murph. (N. C.) 173.

⁵ Per Brett, J., *Nugent v. Smith*, 1 C. P. D. 19.

working loss to a vessel taken unprepared by it.¹ For this latter view the case of *Amies v. Stevens*² was vouched, where a hoy going through a bridge was driven against a pier by a sudden gust of wind, and sunk. *Amies v. Stevens.*

The whole subject of the carrier's immunity for an "act of God" was elaborately gone into by the Court of Appeal in *Nugent v. Smith*;³ there Cockburn, C.J., adopted the view of Story,⁴ held that losses by perils of the sea must arise from some overwhelming power which cannot be guarded against by ordinary exertions of human skill and prudence; and that the same is equally true with regard to acts coming within the designation of "act of God;" therefore, all that can be required of the carrier is that he should do all that is reasonably and practically possible to ensure the safety of the goods. If, despite the resort to all the means known to prudent and experienced carriers, a storm or other natural agency works damage, the carrier is protected, since the injury may then be said to come from the "act of God." Mellish and James, L.JJ., expressed their conclusion in a proposition which they worded as follows:⁵ "The 'act of God' is a mere short way of expressing this proposition. A common carrier is not liable for any accident as to which he can shew that it is due to natural causes directly and exclusively without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected from him."⁶ *Nugent v. Smith, view of Cockburn, C.J.*

Proposition adopted by Mellish and James, L.JJ.

The "act of God" will not in every case excuse from liability; for example, where an Act of Parliament provides that in the event of damage occurring the liability shall be discharged in any particular way the Act may indicate. This is pointed out by Lord Cairns, C., in *Wear River Commissioners v. Adamson*:⁷ "If a duty is cast upon an individual by common law, the act of God will excuse him from the performance of that duty. No man is compelled to do that which is impossible. It is the duty of a carrier to deliver safely the goods entrusted to his care; but if in carrying them with proper care they are destroyed by lightning or swept away by a flood, he is excused, because the safe delivery has, by the act of God, become impossible. If, however, a man contracts that he will be liable for the damage occasioned by *Even act of God will not in all cases protect from liability.*

River Wear Commissioners v. Adamson.

¹ Per Spencer, J., *Colt v. M'Mechen*, 6 Johns. (Sup. Ct. N. Y.) 160, at 165: "He caused the gust to blow in the one case; and in the other, the wind was stayed by him."

² 1 C. P. Div. 423, at 437.

³ 1 C. P. Div. at 444.

⁴ See *Nichols v. Marsland*, 2 Ex. Div. 1, at 5; and per Fry, J., *Nitro-phosphate and Odam's Chemical Manure Company v. London and St. Katharine Docks Company*, 9 Ch. D. 503, at 516.

⁵ 1 Str. 127.

⁶ Bailm. § 512 a.

⁷ 2 App. Cas. 743, at 750.

a particular state of circumstances, or if an Act of Parliament declares that a man shall be liable for the damage occasioned by a particular state of circumstances, I know of no reason why a man should not be liable for the damage occasioned by that state of circumstances whether the state of circumstances is brought about by the act of man or by the act of God. There is nothing impossible in that which, on such an hypothesis, he has contracted to do, or which he is by the statute ordered to do—namely, to be liable for the damages.”

The law as thus stated can be traced back as far as the 28 and 29 Henry VIII., where it is laid down with equal distinctness¹ by Fitzherbert and Shelley, JJ., holding that “the lessee is excused from the penalty; as if it were of an house which is burnt by lightning, or overturned by the wind, because it is the act of God, which cannot be resisted.”²

(a) Acts of the enemies of the King.

2. The second exception to a common carrier's liability is for acts “of the enemies of the King.”³

By “the enemies of the King” are not to be understood mere private depredators, who, in a sense, are at war with society, but the public enemies of the Sovereign of the carrier, whether that Sovereign be an Emperor, a Queen, or a reigning Duke.⁴ The ground of this exception is probably the inability of process to issue against the wrongdoer, and, as the King's Courts could not assist the bailee to his remedy, so it was inequitable that they should assist the bailor.⁵ Thus, in the *Marshal's Case*⁶ an action of debt was brought against the Marshal of the Marshalsea for an escape of a prisoner. The plea was that enemies of the King broke into the prison and carried off the prisoner against the will of the defendant. The Court distinguished, saying if alien enemies of the King, for instance the French, released the prisoner, or perhaps if the burning of the prison gave him a chance to escape, the excuse would be good, “because then (the defendant) has remedy against no one.” On the other hand, if subjects of the King broke the prison, the defendant would be liable, for they are not enemies, but traitors.

Pirates.

Losses occasioned by robbers or rioters are not regarded as

¹ Aleyn 26. See, also *Viterbo v. Friedlander*, 120 U. S. (13 Davis) 707.

² Dyer 33, Case (10).

³ See *Pickering v. Barclay*, Style 132, Rolle, J., said: “I suppose that pirates are perils of the sea”; “and to this purpose a certificate of merchants was read in Court, that they were so esteemed among merchants. Yet the Court desired to have Granly, the Master of Trinity House, and other sufficient merchants, to be brought into the Court to satisfy the Court *visa voce* Friday next following. Judgment was given this term *nū capiat per villam*, because the taking by pirates are accomplished perils of the seas.” See also *Barton v. Wolliford*, Comb. 56.

⁴ *Russell v. Niemann*, 17 C. B. N. S. 163; *The Heinrich*, L. R. 3 A. & E. 424.

⁵ Holmes, *The Common Law*, 177, 201.

⁶ Y. B. 33 H. VI. 1, pl. 3.

losses by a public enemy, though there must be a time when riot or insurrection may be merged in actual belligerency.¹ Public enemies are not merely those who, being the agents of a *de facto* Government, are engaged in war with the State of which the carrier is a member,² since the designation of public enemy is held to include pirates;³ and this held good in the civil law as well.⁴ Robbery within the realm is not an exception from the carrier's liability; and the definition of piracy⁵ is the committing those acts of robbery and depredation upon the high seas which, if committed upon land, would have amounted to felony.⁶ The distinction has probably arisen from the inability of any nation to keep a maritime police to perform at sea like functions to its municipal police at home; whence robbery on the high seas, from the greater facilities for it and the less means of prevention against it, has come to be differently regarded from robbery within the realm. Thus it is that pirates have ever been regarded in the light of public enemies, as Lord Bacon says:⁷

Public enemies.
view.

“Indubitatum semper fuit, bellum contra piratas geri posse per nationem quamcumque, licet ab iis minime infestatam et læsam. Vera enim causa hujus rei hæc est, quod piratæ communes humani generis hostes sint; quos idcirco omnibus nationibus persequi incumbit, non tam propter metus proprios quam respectu fœderis inter homines sociales. Sicut enim quædam sunt fœdera in scriptis et in tractatus redacta contra hostes particulares inita; ita naturalis et tacita confœderatio inter omnes homines intercedit contra communes societatis humanæ hostes.”

Morse v. Slue⁸ might, at first sight, seem an authority pointing

¹ Y. B., 33 Henry VI. 1, pl. 3. In an anonymous case, in Hil. 38 Eliz., Owen 57, it is said, by Gawdy, J.: “If rebels break a prison whereby the prisoners escape, yet the gaoler shall be responsible for them; as it is in the 33 H. 6.” On which Popham, C.J., remarks: “In that case the gaoler hath remedy over against the rebels, but there is no remedy over in our case,” i.e., where goods were taken at sea by pirates. Gawdy thereupon adds: “Then the diversity is when the factor is robbed by pirates and when by enemies.” Popham, C.J., rejoins to this, “There is no difference.” Also see *Paradine v. Jane*, Aleyn 26. Confederate troops were held public enemies within the meaning of the law, in *Philadelphia, &c., Railroad Company v. Harper*, 29 Md. 330.

² *Gage v. Tirrell*, 91 Mass. 299.

³ *Story*, Bailm. § 25.

⁴ *Si quid naufragio, aut per vim piratarum perierit non esse iniquum exceptionem dari*: D. 4, 9, 3, § 1.

⁵ Russell, Crimes (5th ed.), vol. i. 253. See *United States v. Smith*, 5 Wheat. (U. S.) 153, a judgment by Story, J., and a note displaying extraordinary learning and research by the reporter, 163–180. Also *Dawson's Case*, 13 How. St. Tr. 451, Sir Charles Hedges's charge to the grand jury, at 454. In *Bonnet's Case*, 15 How. St. Tr. 1231, at 1234, *pirata* is said to be derived from *πεῖρᾱ*, transire, a *transcundo mare*, and anciently to have been taken “in a good and honourable sense and signified a maritime knight and an admiral or commander at sea”; citing Spelman Gloss. *sub voce*; see also Du Cange Gloss. *sub voce*. See particularly Vin. Abr. Piracy and Pirates; Bewes *Lex Mercatoria* (6th ed.), vol. i. 351.

⁶ The Magellan Pirates, 1 Ecc. & Ad. (Spinks) 81, at 84; Forsyth, Cases and Opinions on Constitutional Law, 116; Wheaton, International Law (Lawrence's ed.), 246 *cum notis*.

⁷ Dialogue, De Bello Sacro, Bacon's Works (ed. 1803), vol. x, 313, 314; in English (Spedding's ed.), vol. vii. 32.

⁸ 1 Vent. 190, 238; Sir T. Raym. 220.

the other way, and importing a liability on the part of the carrier even in the case of loss from pirates. A special verdict found that the defendant's ship lay in the Thames with goods of the plaintiff's on board, and a sufficient number of men to look after them, when, in the night, eleven persons, on pretence of pressing seamen for the King's service, came on board and took the goods. In an action to recover for the loss of the goods, it was argued that the defendant was a common carrier, and so obliged to keep the goods at his peril; to which it was answered that, by the civil law, if goods were taken by pirates, the master should not answer for them. Other points were taken in argument, and "the Court inclined strongly for the defendant, there not being the least negligence in him";¹ subsequently Hale, C.J.,² distinguished the case from one of piracy; "This case," said he, "is not to be measured by the rules of the Admiral law, because the ship was *infra corpus comitatus*." The fact that the robbery was from a ship was thus not enough to constitute piracy, it was necessary besides that the crime should be committed on the high seas.

Hale, C.J.'s,
distinction.

Carrier must
use his best
means to pro-
tect the goods
even in the
case of a public
enemy.

It is not, however, by yielding to every attack of a public enemy that a carrier is able to excuse himself for the loss of goods entrusted to him to be carried. If it be shewn that, though the attack was by public enemies, he did not resort to reasonable means of resistance, and at once yielded, he would not be excused because his inadequate care was against public enemies, any more than he would were it any ordinary and preventible evil. He is bound to use due diligence to prevent destruction and loss. If the journey to be undertaken is a hazardous one, it becomes the duty of the carrier to provide a man of good judgment to take charge of the goods, and his duty then becomes identified with the general rule; for the man so appointed is bound to act as an average prudent man would do in the transaction of his own business; and that ordinary diligence which the law demands must be judged of by reference to the surroundings in which it is involved.³

(3) Where
loss or dete-
rioration of
goods arises
from inherent
defect.
Blower v.
Great Western
Railway Com-
pany.

3. The carrier is excused where loss or deterioration of the goods arises from inherent defect in them.

The law in England was thus laid down in two almost simultaneous cases, *Blower v. Great Western Railway Company*⁴ and

¹ 1 Vent. 190; *Barclay v. Cuculla y Gana*, 3 Doug. 389.

² 1 Vent. at 238; or according to 1 Mod. 85, n. (a): "The master could not avail himself of the rules of the civil law by which masters are not chargeable *pro damno fatali*." Cp. *Sutton v. Michell*, 1 T. R. 18, and see *Abbot Merchant Ships* (13th ed.), 515.

³ *Holladay v. Kennard*, 12 Wall. (U. S.) 254.

⁴ L. R. 7 C. P. 655.

*Kendall v. London and South-Western Railway Company.*¹ In the former a bullock delivered to the defendants to be carried escaped from the truck in which it was placed, and was killed, without any negligence on the part of the defendants. Willes, J., in giving judgment, cited with approval the passage dealing with the subject in *Story on Bailments*,² "where the authorities are all collected." "Although," says Story, "the rule is thus laid down in general terms at the common law, that the carrier is responsible for all losses not occasioned by the act of God or of the King's enemies; yet it is to be understood in all cases that the rule does not cover any losses, not within the exception, which arise from the ordinary wear and tear and chafing of the goods in the course of their transportation, or from their ordinary loss, deterioration in quantity and quality in the course of the voyage, or from their inherent natural infirmity and tendency to damage, or which arise from the personal neglect, or wrong, or misconduct of the owner or shipper thereof. Thus, for example, the carrier is not liable for any loss or damage from the ordinary decay or deterioration of oranges or other fruits in the course of the voyage from their inherent infirmity or nature,³ or from the ordinary diminution or evaporation of liquids,⁴ or the ordinary leakage from the casks in which the liquors are put in the course of the voyage, or from the spontaneous combustion of goods, or from their tendency to effervescence or acidity, or from their not being properly put up and packed by the owner or shipper; for the carrier's implied obligations do not extend to such cases."⁵

Story, cited by Willes, J.

In *Kendall v. London and South-Western Railway Company* plaintiff's horse was carried by the defendants in the way of their business, and, at the end of the journey, was found to be injured, without negligence on the part of the defendants. The Court of Exchequer, after a verdict for the plaintiff at the trial, directed the verdict to be entered for the defendant. "There is no doubt in this case," said Bramwell, B., "that the horse was the immediate cause of its own injuries. That is to say, no person got into the box and injured it. It slipped, fell, or kicked, or plunged, or in some way hurt itself. If it did so from no cause other than its inherent propensities,

Kendall v. London and South-Western Railway Company.

Judgment of Bramwell, B.

¹ L. R. 7 Ex. 373.

² § 492 a.

³ See *Ship Howard v. Wissman*, 18 How. (U. S.) 231, where the cargo was potatoes.

⁴ As to an imperfection in a bung for which the carrier was held not liable, see *Hudson v. Baxendale*, 2 H. & N. 575.

⁵ Cp. Angell, *Carriers* (5th ed.), §§ 210, 211, 212, 214, 214 a; Redfield, *Carriers*, §§ 231 *et seqq.* Internal Decay. Bad Package. For carrier's duty as to perishable goods, *e.g.*, butter, *Beard v. Illinois Central Railway Company*, 18 Am. St. R. 381.

'its proper vice'—that is to say, from fright, or temper, or struggling to keep its legs—the defendants are not liable. But if it so hurt itself from the defendants' negligence, or any misfortune happening to the train, though not through any negligence of the defendants, as, for instance, from the horse-box leaving the line owing to some obstruction maliciously put on it, then the defendants would, as insurers, be liable. If perishable articles—say, soft fruit—are damaged by their own weight and the inevitable shaking of the carriage, they are injured through their own intrinsic qualities. If through pressure of other goods carried with them, or by an extraordinary shock or shaking, whether through negligence or not, the carrier is liable."¹

Nugent v.
Smith.

In *Nugent v. Smith*,² in the Court of Appeal, these two cases are referred to as authoritative expositions of the law on the subject of loss or deterioration of goods arising from inherent defect. Where, however, the negligence of the defendant or his servants has brought on the peril, the damage is attributed to the breach of duty, and not to the vice.³

Law as settled
in America.

In America the law is settled on similar lines, and is authoritatively expounded in the cases of *Nelson v. Woodruff*⁴ and *The Brig Collenberg*.⁵ The rule is thus stated in the Supreme Court of the United States: "If the damage has proceeded from an intrinsic principle of decay naturally inherent in the commodity itself, whether active in every situation or only in the confinement and closeness of the ship, the merchant must bear the loss as well as pay the freight; as the masters and owners are in no fault, nor does their contract contain any insurance or warranty against such an event."⁶ This covers, not only loss by the decay of fruit,⁷ but also damage caused by the effect of that condensation of vapour in the hold of a ship caused by transition from a warm to a cold climate, and called "sweat." In the event of this happening, if there is no defect in the ship or its arrangements and navigation, the carrier is not liable.⁸ Neither is the carrier

¹ In *Ohrloff v. Briscall*, *The Helène*, L. R. 1 P. C. 231, ignorance of shipowners as to the latent effect of heat in storing casks of oil with wool and rags was not held to effect them with liability when oil merchants of great experience were also ignorant.

² 1 C. P. Div. 423, at 443.

³ *Phillips v. Clark*, 2 C. B. N. S. 156; *Gill v. Manchester Railway Company*, L. R. 8 Q. B. 186; *Steel v. State Line Steamship Company*, 3 App. Cas. 72, at 87. Cp. *Trainor v. The Black Diamond Steamship Company*, 16 Can. S. C. R. 156.

⁴ 1 Black (U. S.) 156.

⁵ L. c. 170.

⁶ Per *Nelson, J.*, in *Clark v. Barnwell*, 12 How. (U. S.) 272, at 282; for this he cites *Davidson v. Gwynne*, 12 East, 381; *Sheels v. Davies*, 4 Camp. 119 *sub nom.* *Shields v. Davis*, 6 Taunt. 65. *Abbott, Merchant Ships* (Shee's ed.), 428. Cp. *Abbott, Merchant Ships* (13th ed.), 576. See *Trainor v. The Black Diamond Steamship Company*, 16 Can. S. C. R. 156.

⁷ *The Brig Collenberg*, 1 Black (U. S.) 170; *Ship Howard v. Wissan*, 18 How. (U. S.) 231.

⁸ *Clark v. Barnwell*, 12 How. (U. S.) 272.

liable for loss caused by the operation of an inherent tendency, as, for instance, of some liquors to effervesce.¹

To this heading may be referred *Richardson v. North-Eastern Railway Company*.² A valuable greyhound was delivered to the servants of a railway company, who were not common carriers of dogs. At the time of the delivery the greyhound had on a leather collar, with a strap attached. In the course of the journey it became necessary to remove the greyhound from one train to another, which had not come up at the time the dog was removed. While waiting, he was tied up to the platform of the company's station, and, while so fastened, slipped his head from the collar, ran on the line, and was killed. In the argument, a ruling of Lord Ellenborough, C.J.'s, in *Stuart v. Crawley*,³ was much pressed on the Court. A servant of the plaintiff took a dog to the warehouse of the defendant, who was a common carrier, to be carried. The dog had a string about his neck, and the defendant's book-keeper gave a receipt acknowledging the delivery. The dog was afterwards tied by the cord to a watch-box, but, within half an hour afterwards, slipped his head through the noose, and was lost. It was sought to charge the plaintiff with negligence in not delivering the dog to the defendant's bookkeeper in a state of security, on the analogy of a delivery of goods imperfectly packed. Lord Ellenborough, however, held the defendants liable. "The case," he said,⁴ "was not like that of a delivery of goods imperfectly packed, since there the defect was not visible, but in this case the defendant had the means of seeing that the dog was insufficiently secured." "After a complete delivery to the defendant, he became responsible for the security of the dog; the property then remained at the risk of the defendant, and he was bound to lock him up, or to take other proper means to secure him. The owner had nothing more to do than to see that he was properly delivered, and it was then incumbent on the defendant to provide for his security."

Richardson v. North-Eastern Railway Company.

Stuart v. Crawley.

Lord Ellenborough's statement of the law.

In giving judgment in *Richardson v. North-Eastern Railway Company*,⁵ Willes, J., pointed out that the facts were "obviously different" from what they were in *Stuart v. Crawley*, as the greyhound was fastened by a strap, which indicated that that was the thing by which it was to be secured. "If it was negligence on the part of the guard to

Willes, J.'s judgment.

¹ *Warden v. Greer*, 6 Watts (Pa.) 424. Cp. *Johnson v. Chapman*, 19 C. B. N. S. 563; also the cases cited in *Pirie v. Middle Dock Company*, 44 L. T. 426.

² L. R. 7 C. P. 75. Cp. *Harpers v. Great North of Scotland Railway Company*, 13 *Bettie* 1139.

³ 2 Stark. (N. P.) 323.

⁴ L. c. at 324.

⁵ L. R. 7 C. P. 75, at 82.

fasten her by the strap, it was a negligence which was suggested by the person who delivered her to him without notice that the fastening was an unsafe one. There are, therefore, two important distinctions between that case and the present: first, that there the defendant was a common carrier, and here the defendants are not; and, secondly, that, when the dog was delivered to the defendants' servant, he had the means of seeing that it was insufficiently secured, whereas here the mode of securing the dog was that which is ordinarily adopted—viz., by a collar and strap." Though the first point, that the defendants were not common carriers, would have been sufficient to have discharged them, without negligence—which, in the opinion of the Court, does not appear to have been shewn—the second ground, that the course adopted by the servant in fastening the dog up with a strap, that had the effect of misleading, would have been good, even had the defendants been common carriers, on the analogy of the cases, cited in *Stuart v. Crawley*,¹ of goods badly packed; and it is in that view that the case is here considered.

Visible defect
will not
exclude
carrier's
liability.

If, however, the defect in the packing were visible—as, for example, if casks of wine or spirits were delivered in a manifestly unsafe condition, so that, unless coopered, the contents would leak out—the defendant would not be excused; for he is an insurer, and, as such, is bound to deliver the goods in the state in which he received them. It is otherwise if there is no omission or negligence on the carrier's part.²

Damage caused
partly by
plaintiff's want
of care.

Again, if the injury were partly caused by the plaintiff's want of care, the defendant would not be excused; though the jury would have to consider what the effect on the damages would be.³ This case differs from the case previously touched on, where negligence of the defendant and the vice of a living animal co-operate to produce injury.⁴ There, if the negligence were absent, the vice might be quiescent, and the plaintiff can recover for the whole loss. In the present case, the plaintiff's default operates in any event; and hence should go in reduction of, though it will not excuse, the defendant's liability.⁵

Perishable
goods damaged
by salt water.

With regard to perishable goods so damaged by salt water that they cannot be taken forward to the port of discharge so as to

¹ 2 Stark. (N. P.) 323. The liability of a railway company to strangers for not taking care of dogs being carried by them, through which want of care they escape and bite strangers, is discussed, *Gray v. North British Railway Company*, 18 Rettie 76. Cp. *Dickson v. Great Northern Railway Company*, 18 Q. B. Div. 176.

² *Hudson v. Baxendale*, 2 H. & N. 575, 2 F. & F. 796.

³ *Higginbotham v. Great Northern Railway Company*, 10 W. R. 358; *Cox v. London and North-Western Railway Company*, 3 F. & F. 77; *Barbour v. South-Eastern Railway Company*, 34 L. T. (N. S.) 67.

⁴ *Gill v. Manchester Railway Company*, L. R. 8 Q. B. 186.

⁵ See as to improperly packed goods: *Baldwin v. London, Chatham, and Dover Railway Company*, 9 Q. B. D. 582. Cp. *The Figlia Maggoire*, L. R. 2 A. & E. 106.

earn the freight, it becomes the duty of the master to save and dry the cargo, even as between himself and his owner, though the expense of his performing the duty falls upon the cargo saved.¹ Duty of master of ship in dealing with cargo.

He is at liberty, on occasion arising, to trans-ship, and will be protected if the jury find it to be the proper course of dealing with the goods, although he is not bound to do so.² It has been laid down generally that there is not merely a power, but a duty, for the master, as representing the shipowner, to take reasonable care of the goods entrusted to him; not merely in doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage, but also in taking reasonable measures to check and arrest their loss, destruction, or deterioration by reason of accidents, for the necessary effects of which there is, by reason of an exception in the bill of lading, no original liability.³ In some cases, he may even be bound to sell; to justify doing so, however, he must establish, first, a necessity for the sale,⁴ and, secondly, inability to communicate with the owner and to obtain his directions; and this necessity cannot be established without shewing that every reasonable exertion was used to forward the goods, and that they were not able to be conveyed to their destination as merchantable articles or without an expenditure in excess of their value.⁵

Under this head of loss or deterioration from inherent defect may also be noticed the case of *Johnson v. North-Eastern Railway Company*,⁶ an action to recover a locomotive engine entrusted to the defendants to be carried by them under a special contract providing for conveyance on the engine's own wheels, and under steam. A bolt giving way, prevented it being forwarded further by the method contracted for. The plaintiffs contended that the defendants had undertaken the carriage, and that, if it could not be conveyed in the stipulated mode, it became the duty of the defendants to forward it by some other mode. The defendants contended that the breakdown of the engine constituted an exception to their duty to deliver. This view was approved by the majority of the Court of Appeal; by Bowen, L.J., because there is an implied exception

¹ *Mordy v. Jones*, 4 B. & C. 394; *Philpott v. Swann*, 11 C. B. N. S. 270, at 281; *Notara v. Henderson*, L. R. 7 Q. B. 225, at 235.

² *Per Patteson, J.*, *Tronson v. Dent*, 8 Moo. P. C. C. 419, at 455.

³ *Cargo ex Argos*, L. R. 5 P. C. 134, at 165; *Tronson v. Dent*, 8 Moo. P. C. C. 419.

⁴ *Australasian Steam Navigation Company v. Morse*, L. R. 4 P. C. 222; *Acatos v. Burns*, 3 Ex. Div. 282.

⁵ *Atlantic Mutual Insurance Company v. Huth*, 16 Ch. D. 474. As to insurance against a total loss on a cargo of fruit, and what constitutes total loss, see *Dyson v. Rowcroft*, 3 B. & P. 474; approved *Cologan v. London Assurance Company*, 5 M. & S. 447, at 455; *Rankin v. Potter*, L. R. 6 H. L. 83, at 119.

⁶ 5 Times L. R. 68. (C. A.) *Cp. The Freedom*, L. R. 3 P. C. 594, at 600.

Lord
Halsbury, C.

to the duty of common carriers in the case of inherent defects, and by Lord Esher, M.R., on the ground that the contract was a special one, and that even then there was an implied exception in the case that had happened. Lord Halsbury dissented, holding, on the facts, that the defendants were bound to make delivery.

(4) Where
goods are of
a dangerous
nature which is
not apparent.

4. The common carrier is not liable for loss of goods where the goods are of a dangerous nature, or, being apparently safe, require for any reason, special precautions to be used in their carriage; unless the fact of such dangerous or special nature is communicated to the carrier, so that he may adopt the necessary precautions.¹

Willes, J., in
Talley v.
Great Western
Railway
Company.

This amounts to no more than that applying the principle of contributory negligence is to the case of common carriers as it is in other relations. Thus, where the owner of goods makes his selection of the carriage they are to be conveyed in, or loads them in a carriage allotted to him by the carrier, the carrier is not liable for loss if, in the first instance, the loss arises from defects in the carriage which were pointed out before choosing;² or if, in the second instance, the loss arises from defects in the loading, which the owner of the goods has himself undertaken;³ for in both cases the act of the owner of the goods has varied the duty that else the common law would have imposed. A passage from the judgment of Willes, J., in *Talley v. Great Western Railway Company*,⁴ is much to the point. He says,⁵ confining his remarks to the case of passengers' luggage, though the principle is equally good for goods generally: "If the passenger packed up articles liable to ignition by friction, and by the shaking of the carriage they caught fire; if a passenger were to look on whilst his luggage was being taken away or rifled, when he might be reasonably expected to interfere; if he were to expose small articles of apparent great value in a conspicuous part of the carriage and leave them there while he unreasonably absented himself and they were in consequence purloined, he would have no more just reason for complaint against the carrier than if he had upon some false alarm thrown his property out of the

¹ *Brass v. Maitland*, 6 E. & B. 470; per Blackburn, J., *Readhead v. Midland Railway Company*, L. R. 2 Q. B. 412, at 436, L. R. 4 Q. B. 379; *Hutchinson v. Guion*, 5 C. B. N. S. 149; *Alston v. Herring*, 11 Ex. 822; *Pierce v. Winsor*, 2 Sprague, (U. S. Adm.) 35; *Angell, Carriers* (5th ed.), § 212, n. (c). *Williams v. The East India Company*, 3 East 192, is an action by a shipowner against the charterer for the loss of the ship through the shipping of dangerous goods without notice. Cp. *Cramb v. Caledonian Railway Company*, 19 Rottie 1054; *Standard Oil Company v. Tierney*, 36 Am. St. R. 595; *ante*, 61.

² *Harris v. Northern Indiana Railroad Company*, 20 N. Y. 232.

³ *East Tennessee Railroad v. Whittle*, 27 Ga. 535, cited *Angell, Carriers* (5th ed.), § 214 n. a.

⁴ L. R. 6 C. P. 44.

⁵ L. c. at 51.

window." A little further on he states the principle of all these cases: "There is, moreover, a general principle applicable to these as to all bailments—viz., that the bailee shall not be heard to complain of loss occasioned by his own fault." General principle.

By the Railway Clauses Act, 1845, s. 105,¹ there is a statutory prohibition, imposing a fine of £20 for its violation, against sending goods of a dangerous nature without distinctly marking the nature of the goods on the outside of the package containing them, and giving notice thereof to the carrier. Where the sender has himself received the goods without a knowledge of their contents, and forwarded them without negligence and without acquiring a knowledge of their contents, he is not within the purview of the Act.² Railway Clauses Act, 1845, s. 105.

In America a defendant has been held liable to answer in damages for putting on board contraband goods without the knowledge of the owner, whereby a seizure of the plaintiff's ship was brought about.³ There seems no doubt on principle that, where this is done without the knowledge or against the orders of the shipowner, as in the case cited, it would be so; it is otherwise if the shipowner acts with knowledge and without a special contract. American decision.

In *Acatos v. Burns*⁴ it was contended that *Brass v. Maitland*⁵ shewed that there is a warranty by the shipper that goods shipped have no concealed defect at the time of shipment; but the Court of Appeal negatived this, and distinguished that case on the ground that the nature of the danger was as much known to the one side as to the other. The rule of law to be drawn from the decision is thus stated in the head-note: "Where the owner of a vessel has an opportunity of examining goods shipped on board of her, no warranty on the part of the owner of the goods can be implied that they are fit to be carried on the voyage." It is doubtful whether the expressions in the judgments go further than to deny that goods shipped are taken to be warranted free from concealed defect, and whether an opportunity of examining goods would in all cases be conclusive against the shipowner's liability in respect of them. Acatos v. Burns.
Rule of Law.

5. The common carrier is not liable for a loss where there has (5) Where there has been fraud.

¹ 8 Vict. c. 20.

² *Hearne v. Garton*, 2 E. & E. 66. As to the restrictions on the carriage of dangerous goods, see 36 & 37 Vict. c. 85, ss. 23, 28, extended 38 & 39 Vict. c. 17, s. 42. As to gunpowder, &c. Explosives Act, 1875 (38 & 39 Vict. c. 17); 39 & 40 Vict. c. 36, s. 139; the Petroleum Act, 1871 (34 & 35 Vict. c. 105), amended by 42 & 43 Vict. c. 47; 44 & 45 Vict. c. 67. See Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 446-450.

³ *Sparks v. West*, 1 Wash. (U. S. Circ. Ct.) 238.

⁴ 3 Ex. Div. 282.

⁵ 6 E. & B. 470.

⁶ See *ante*, 1059.

been fraud on the part of the owner of the goods in the constitution of the contract, "for the common law abhors fraud, and will not fail to overthrow it in all forms, whether new or old, in which it may be manifested."

As the carrier incurs great responsibility by his business, so he has a right to look for such an amount of good faith from the owner of the goods as will enable him to decide on the care that the charge of the goods requires, and the fair remuneration he should receive. The law on this point dates back a great while —so long ago as 1649, when the case of *Kenrig v. Eggleston*¹ was decided. The plaintiff delivered a box to the porter of the carrier, saying "there was a book and tobacco in the box," when in truth it contained £100 in money besides. Rolfe, C.J., "directed, that although the plaintiff did tell him of some things in the box only, and not of the money, yet he must answer for it; for he need not tell the carrier all the particulars in the box. But it must come on to the carrier's part to make special acceptance. But in respect to the intended cheat to the carrier, he told the jury they might consider him in damages, notwithstanding, the jury gave £97 against the carrier, for the money only (the other things being of no considerable value), abating £3 only for carriage. *Quod durum videbatur circumstantibus*." As to which last remark, in *Gibbon v. Paynton*,² Lord Mansfield, C.J., said, as he should have thought this a case of fraud, he "should have agreed in opinion with the *circumstantibus*."

In *Tyly v. Morrice*,³ two bags of money, sealed up, were delivered to the carrier, with a declaration that they contained £206; for which sum he gave a receipt. The bags having been lost, the carrier paid the £206; it then appeared that they really contained £450; for the difference between which sum and the sum paid an action was brought. The Chief Justice told the jury that, "since the plaintiffs had taken this course to defraud the carrier of his reward, they had thereby barred themselves of that remedy which is founded only on the reward."

The cases are commented on by Lord Mansfield, C.J., in *Gibbon v. Paynton*,⁴ where plaintiff sent £100 by the defendant's coach hid in hay in an old mail-bag. "The bag and the hay arrived, but the money was gone." In argument, *Titchburne v. White*,⁵ tried at Guildhall by King, C.J., was cited,⁶ where the

*Kenrig v.
Eggleston.*

*Direction of
Rolfe, C.J.*

*Lord Mans-
field's
comment in
Gibbon v.
Paynton.
Tyly v.
Morrice.*

*Gibbon v.
Paynton.*

*Titchburne
v. White.*

¹ Aleyn 93.

² 4 Burr. 2298, at 2301.

³ Carthew (K. B.) 485. There is a note: "The case of *Kenrig v. Egglestone* was cited as an authority for the plaintiffs: *sed non allocatur*; for the Court held that case different from the present cases."

⁴ 4 Burr. 2298.

⁵ 1 Str. 145. In *Malpica v. M'Kown*, 1 La. Rep. 248, the principle is doubted, but

⁶ 4 Burr. at 2300. See *Humphreys v. Perry*, 148 U. S. (41 Davis) 627.

Chief Justice held "that if a box is delivered generally to a carrier and he accepts it, he is answerable, though the party did not tell him there is money in it." Lord Mansfield said :¹ "This action is brought against the defendant upon the foot of being a common carrier. His warranty and insurance is in respect of the reward he is to receive ; and the reward ought to be proportionable to the risque. If he makes a greater warranty and insurance, he will take greater care, use more caution, and be at the expense of more guards or other methods of security ; and therefore he ought in reason and justice to have a greater reward. Consequently, if the owner of the goods has been guilty of a fraud upon the carrier, such fraud ought to excuse the carrier. . . . And if he has been guilty of a fraud, how can he recover? *Ex dolo malo non oritur actio.*"

In *Gibbon v. Paynton*² there was actual fraud. In *Miles v. Cattle*³ the plaintiff was entrusted with a £50 note to deliver to the defendant for carriage. Instead of doing so, he slipped it into his own bag of clothes. The bag containing the note was stolen. He was held entitled to recover for the loss of the bag and the clothes, but not for the note ; since, in violation of his trust, "the plaintiff thought proper not to deliver the parcel to the defendants, but to deposit it in his own bag ; thereby depriving Garbut [the owner] of any remedy he might have had against the defendants in case the parcel had been lost by them, and becoming himself a wrongdoer towards the defendants by depriving them of the sum they would otherwise have earned for the carriage of the parcel."⁴

The reasoning of this case seems, if sound, very far-fetched ; the placing a £50 note of anybody's in such a place as a clothes bag may well be such negligence as to disentitle the owner of the bag to recover. But to go into questions of the ownership of the note, and the plaintiff's duty in respect of it, is hazardous. The vital circumstance determining the plaintiff's right to recover seems preferably to be that indicated by Lord Ellenborough in *Rooth v. Wilson*, "interest in the integrity and safety" of the property, and not the consideration whether the plaintiff was in default in his own conduct. Undoubtedly the plaintiff was liable to answer over to his bailor,⁵ and analogy suggests that this is the correct test and not considerations of the plaintiff's conduct pre-

the conclusion is come to that it is the better opinion that the master would be responsible for a trunk or parcel received on board a vessel without information as to its contents unless there is notice given disclaiming responsibility. See also *Arayo v. Currel*, 1 La. Rep. 528. ¹ 4 Burr. at 2301. ² L. c. 2298.

³ 6 Bing. 743. Cp. *Bank of Kentucky v. Adams Express Company*, 93 U. S. (3 Otto) 174.

⁴ L. c. per Tindal, C.J., at 747.

⁵ See *ante*, 884.

vously to the defendant's accepting the mandate out of which the claim arose.¹

Orange
County Bank
v. Brown.

Orange County Bank v. Brown² is similar to *Miles v. Cattle* in its facts. The plaintiff, a passenger by the defendants' boat—the defendants were common carriers of passengers—had with him as baggage an ordinary travelling trunk containing a very considerable sum of money. The trunk and its contents were lost. On an action being brought, it was held that as a passenger the plaintiff was merely entitled to have his "baggage"³ conveyed; that the sum of money in the trunk could not be regarded as baggage, and therefore the plaintiff could not recover; because his conduct in representing the trunk and its contents as mere baggage, when in fact he was conveying a large portion of very valuable property, was not fair; for while it deprived the defendants of the reward they were entitled to for the carriage of such property, it exposed the carrier to greater risks than he contracted to encounter, and was only carried by him in so far as he was a victim to a deception practised by the plaintiff. If *Miles v. Cattle* had been decided on the ground of the unfair enhancement of the risk, the decision would have been unimpeachable; for the law similarly regards conduct actually fraudulent and conduct the effect of which is fraudulent by wilfully depriving the carrier of his rights, though no actual dishonest intent may be present.⁴

6. The common carrier is not liable for delay in delivery arising from circumstances beyond his control.

(6) Where
delay is
beyond
carrier's
control.
Briddon v.
Great
Northern
Railway
Company.

The earliest case on this point, *Briddon v. Great Northern Railway Company*,⁵ has been explained as being referable to the "act of God." A heavy snowstorm obstructed the defendants' line, and impeded the delivery of cattle. It was admitted that "extraordinary effort" would have enabled the delivery to have been made. The opinion of the Court was that extraordinary effort was not in the circumstances to be expected from the company, whose contract was only to carry "without delay and in a reasonable time under ordinary circumstances."

Taylor v.
Great
Northern
Railway
Company.

In the following case of *Taylor v. Great Northern Railway Company* delay took place through the negligence of another company, who had running powers over the defendants' line. The county

¹ Story, Bailm. § 152, disapproves the grounds of the decision in *Miles v. Cattle*.

² 9 Wend. (N. Y.) 85.

³ As to what is "baggage," see *Phelps v. London and North-Western Railway Company*, 19 C. B. N. S. 321; *Hudston v. Midland Railway Company*, L. R. 4 Q. B. 366; *Macrow v. Great Western Railway Company*, L. R. 6 Q. B. 612, at 622; *Cusack v. London and North-Western Railway Company*, 7 Times L. R. 452; *Jordan v. Fall River Railroad Company*, 59 Mass. 69.

⁴ The law of the United States is clear on this point: 2 Kent, Comm. 603; *Rail-road Company v. Fraloff*, 100 U. S. (10 Otto) 24.

⁵ (1858) 28 L. J. Ex. 51.

⁶ (1866) L. R. 1 C. P. 385.

court judge having held the defendants responsible, the Court of Common Pleas reversed his decision, holding¹ that a common carrier's duty to deliver safely has nothing to do with the time of delivery, which is a matter of contract; "the first duty of a common carrier is to carry the goods safely, and the second to deliver them, and it would be very hard to oblige a carrier, in case of any obstruction, to risk the safety of the goods in order to prevent delay. His duty is to deliver the goods within a reasonable time, which is a term implied by law in the contract to deliver; as Tindal, C.J., puts it when he says 'the duty to deliver within a reasonable time being merely a term ingrafted by legal application upon a promise or duty to deliver generally';² and "reasonable time" is measured by reference to all the circumstances of the case. *Baldwin v. London, Chatham, and Dover Railway Company*³ was a case of delay, where the county court judge found "that the proximate cause of the loss of the goods was the improper condition in which they were packed, and not the delay." Had the packing been proper, he would have had to find, as a question of fact, whether the delivery was within a "reasonable" time after the receipt.⁴

7. The carrier is exonerated from his obligation to his bailor where the goods of the latter is taken from him by legal process; that is, if the carrier notifies his bailor of the fact with reasonable diligence.⁵

This principle, common to the whole law of bailments, is treated here for convenience rather than from any prominence given to it in this subdivision. When property in the hands of a bailee for hire is demanded by third persons under colour of process, it lies upon the bailee to satisfy himself as to the validity of the process and of the demand; and in the event of the process being bad he will not be excused to his bailor by merely protesting against the demand and then parting with the goods. "A

¹ *L. c.* per Byles, J., at 387.

² *Raphael v. Pickford*, 5 M. & G. 551, at 558. As to reasonable time, see *ante*, 1010. The carrier is excused for delay in delivery caused by mobs or a strike accompanied by intimidation and violence, but not for the loss of the goods, *Gulf, &c. Railway Company v. Levi*, 18 Am. St. R. 45; *Cp. Forward v. Pittard*, 1 T. R. 27. *Ante*, 1062.

³ 9 Q. B. D. 582.

⁴ *Wren v. Eastern Counties Railway Company*, 1 L. T. (N. S.) 5. A contract to carry goods by a given train does not amount to a warranty that the train will arrive at a particular hour: *Lord v. Midland Railway Company*, L. R. 2 C. P. 339. That a train arrives several hours late is *prima facie* evidence of unreasonable delay in carrying goods, and demands explanation: *Roberts v. Midland Railway Company*, 25 W. R. 323. In *Norris v. Savannah, Florida, and Western Railway Company*, 11 Am. St. R. 355, it was held that where the delivery of perishable freight is delayed by an unprecedented flood, constituting an "act of God," mere failure to notify the consignor or consignee of the detention is not of itself negligence rendering the carrier liable. There is an exhaustive note to the report of this case, on the carrier's liability for loss or deterioration of goods by delay, well worthy of study, 360-366. *Post*, 1087.

⁵ *Bliven v. Hudson River Railroad Company*, 36 N. Y. 403.

Common carrier's duty to deliver independent of time of delivery.

(7) Goods taken by legal process.

person who would allow his own property to be taken from him under like circumstances and without doing more to prevent such a result, or to repossess himself of it when taken, could scarcely be called a prudent man."¹

Carrier delivering goods to the sheriff on invalid process is still excused.

In an American State case² an attempt was made to hold a carrier liable for giving up goods to the sheriff on process, on its face valid, but ultimately turning out to be invalid. The attempt was unsuccessful, and the considerations pointed out by the Court seem conclusive in favour of the view adopted. "Whatever," it was said, "may be a carrier's duty to resist a forcible seizure without process, he cannot be compelled to assume that regular process is illegal, and to accept all the consequences of resisting officers of the law. If he is excusable for yielding to a public enemy, he cannot be at fault for yielding to actual authority what he may yield to usurped authority."

No defence to shew after goods negligently parted with, that they were seized under process.

It is not a defence or bar to an action against a bailee to shew when he is sued by his bailor, whether for conversion or for negligent loss of the property bailed, that after it went into the possession of others it was levied upon under process against the owner. If, however, the owner becomes repossessed of the property in his original right, facts indicating this will go in mitigation of damages.³ The case has also arisen of goods wrongly seized under legal process as the goods of one man, while a writ has been in the hands of the sheriff to seize them as the goods of their lawful owner; and it has been held that the fact, that they *might* have been levied and sold under an execution against their owner, could not be given in evidence in mitigation of damages in an action brought for the wrong by the true owner.⁴

(8) In certain circumstances where he has given notice.

8. The common carrier *may* not be liable at common law where he has given a notice which is communicated to the customer, that he will only carry goods under certain conditions set out in the notice.⁵ By subsequent changes in the law a notice is not sufficient; there must now be a contract.⁶

Smith v. Horne.

"The doctrine of notice," says Burrough, J., in *Smith v. Horne*,⁷

¹ *Roberts v. Stuyvesant Safe Deposit Company*, 123 N. Y. 57. 20 Am. St. R. 718.

² *Pingree v. Detroit, &c. Railroad Company*, 11 Am. St. R. 479.

³ Compare *ante*, 999.

⁴ *Ball v. Liney*, 48 N. Y. 6, 8 Am. R. 511. Cp. Story, Eq. Jur. §§ 805 *et seqq.* When property has been tortiously taken, the owner is not only entitled to an action, but to full compensation in damages; and he can neither be deprived of the one nor the other by any mere act of the wrongdoer, as by an unaccepted offer to return the property, or causing it to be subsequently taken on legal process in *his own favour* against the owner. Evidence, however, may be given in mitigation of damages where there has been a sale before suit brought, or legal process issued against the owner in favour of some person other than the wrongdoer: *Higgins v. Whitney*, 24 Wend. (N. Y.) 379.

⁵ *Thorogood v. Marsh, Gow* (N. P.) 107.

⁶ The Carriers Act, 1830 (11 Geo. IV. & 1 Will. IV. c. 68).

⁷ 8 Taunt. 144, at 146.

"was never known until the case of *Forward v. Pittard*,¹ which I argued many years ago. Notice does not constitute a special contract; if it did, it must be shewn on the record; it only arises in defence of the carrier. . . . I lament that the doctrine of notice was ever introduced into Westminster Hall." *Forward v. Pittard* was decided in 1785, and the decision was against the carrier (though not on the point of notice).

In 1804 *Nicholson v. Willan*² was before the King's Bench. The action was on a carrier's common law liability for the loss of goods. The plea was Not guilty; under which it was proved that the defendants had some time before put up an advertisement in their office at Nottingham limiting their liability for goods above the value of £5 unless the goods were insured. Lord Ellenborough, C.J., said³ the practice of making a "special acceptance" had prevailed for a long time, and "there is no case to be met with in the books in which the right of a carrier thus to limit by special contract his own responsibility has ever been by express decision denied."⁴ It is here seen that Lord Ellenborough, C.J., treats "notices" and "special acceptances" as identical. Moreover, in *Kenrig v. Eggleston*,⁵ in the note to *Southcote's Case*,⁶ in *Gibbon v. Paynton*⁷ by Yates, J.; in *Morse v. Slue*,⁸ in *Catley v. Wintringham* by Lord Kenyon, C.J.,⁹ the validity of a special acceptance as a limitation of the carrier's common law liability was distinctly recognized; and the recognition carries back the law of the subject to a very early period.

Notice, as a form of special acceptance as distinguished from conditions assented to as part of the contract, it must be gathered from the *dictum* of Burrough, J., was of much later introduction than special acceptance as a special and individual contract. Yet whatever the earlier view may have been, there is no doubt that at the time of the judgment in *Nicholson v. Willan*¹⁰ any distinction that may have originally been drawn between notices and special acceptances had been abandoned.

In 1816 Lord Ellenborough, C.J., in *Leeson v. Holt*,¹¹ again treated "notices" and "special acceptances" as indistinguishable,

¹ 1 T. R. 27. In the case as reported there is no allusion to the point.

² 5 East 507. Cp. *Bodenham v. Bennett*, 4 Price (Ex.) 31, per Graham, B., at 33. law.

³ L. c. at 513.

⁴ See *Harris v. Packwood*, 3 Taunt. 264.

⁵ *Aleyn* 93.

⁶ 4 Co. Rep. 83 b: "It is good policy for him who takes any goods to keep, to take them in special manner, *scil.* to keep them as he keeps his own goods or to keep them the best he can at the peril of the party; or if they happen to be stolen or purloined, that he shall not answer for them; for he who accepteth them, ought to take them in such or the like manner, or otherwise he may be charged by his general acceptance."

⁷ 4 Burr. 2298, at 2301.

⁸ 1 Vent. 190, 238.

¹⁰ 5 East. 507.

⁹ Peake (N. P.) 150.

¹¹ 1 Stark. (N. P.) 186.

Forward v. Pittard.

Nicholson v. Willan.

Notice as a form of special acceptance.

Leeson v. Holt.
Lord Ellenborough's view of the

and operating as contracts. "If," says he, "this action had been brought twenty years ago, the defendant would have been liable, since by the common law a carrier is liable in all cases except two, where the loss is occasioned by the act of God, or of the King's enemies using overwhelming force, which persons with ordinary means of resistance cannot guard against. It was found that the common law imposed upon carriers a liability of ruinous extent, and, in consequence, qualifications and limitations of that liability have been introduced from time to time, till, as in the present case, they seem to have excluded all responsibility whatsoever, so that under the terms of the present notice if a servant of the carrier's had in the most wilful and wanton manner destroyed the furniture entrusted to them, the principals would not have been liable. If the parties in the present case have so contracted, the plaintiff must abide by the agreement, and he must be taken to have so contracted if he chooses to send his goods to be carried after notice of the conditions. The question, then, is, whether there was a special contract. If the carriers notified their terms to the persons bringing the goods by an advertisement which, in all probability, must have attracted the attention of the person who brought the goods, they were delivered upon those terms; but the question in these cases always is, whether the delivery was upon a special contract." This may be termed the high-tide mark that the doctrine of notice reached. The case was at *Nisi Prius*, and the views enunciated seem never to have obtained general acceptance amongst judges; indeed, in no other case is the effect of a notice stated with anything like the uncompromising thoroughness with which it is here set out.

Hide v.
Proprietors
of Trent and
Mersey Navigation.
Lord Kenyon's
view of the
law.

Though the cases at the beginning of the nineteenth century treat a notice communicated as evidence of a contract, the law had previously been differently stated. Thus in *Hide v. Proprietors of the Trent and Mersey Navigation*,¹ in 1793, Lord Kenyon, C.J., had expressed his view to be that: "There is a difference where a man is chargeable by law generally and where on his own contract. Where a man is bound to any duty, and chargeable to a certain extent by the operation of law, in such case he cannot by any act of his own discharge himself. As in the case of common carriers, who are liable by law in all cases of losses, except those arising from the act of God, or of the King's enemies; they cannot discharge themselves from losses happening under these circumstances by any act of their own; as by giving notice, for example, to that effect. But the case is

¹ 1 Esp. (N. P.) 36.

otherwise where a man is chargeable on his own contract; there he may qualify it as he thinks fit."

Still between the view of Lord Ellenborough and that of Lord Kenyon there is no necessary contrariety. Lord Ellenborough treats a notice communicated as evidence of a contract on the basis of the notice. Lord Kenyon requires that the notice should form part of a special acceptance. The difference between them would most often resolve itself into an inquiry as to the amount of evidence bringing home the fact of the notice. Lord Ellenborough's view would be satisfied by requiring that the consignor *ought* to have known of the notice and its contents at the time of consigning the goods; Lord Kenyon would require evidence that he actually did know. Yet evidence might be given (as, where there is a wilful abstaining from becoming acquainted with the terms of a notice and thus misleading the carrier), which would bind the consignor to the terms of the contract embodied in the notice, though he were in fact ignorant of the terms of it. While in Lord Ellenborough's point of view knowledge of the notice would not *necessarily* affect the consignor with the terms of it.¹ For some time, at any rate, effect was given to the broader interpretation of Lord Ellenborough, and the mere publication of a notice came to be looked on as *prima facie* limiting liability; and it grew to be the prevalent opinion that a carrier might restrict his liability by a notice—that is, if brought home to his employer—even though that notice was general and not sufficient to constitute a special contract. So non-essential in practice was any active assent on the part of the consignor to create the binding agreement, that it was, and remained, a matter of doubt and controversy whether the notice operated by creating a limitation through the mere expression of the will of the carrier, or by the operation of the assent of the consignor creating a contract between consignor and carrier.² The result of this uncertainty was very fruitful in litigation.

The effect of the state of the law as to notice on the terms of carriage is thus stated by a writer of high authority:³ "Of the extravagance into which this doctrine of notice has run, and the distracting questions which come to be involved in it, the newspapers and the books of English reports are full. One carrier frees himself from responsibility for fire;⁴ another, even from the

Mode of operation of notice differently regarded by Lord Kenyon and Lord Ellenborough.

¹ Cp. per Mellish, L.J., *Parker v. South-Eastern Railway Company*, 2 C. P. Div. 416, at 423, cited, *post*, 1174.

² See *M'Manus v. Lancashire and Yorkshire Railway Company*, 4 H. & N. 327. Per Lord Wensleydale, *Peck v. North Staffordshire Railway Company*, 10 H. L. C. 473, at 574.

³ 1 Bell, *Comm.* (7th ed.), 503.

⁴ *Maving v. Todd*, 1 Stark. (N. P.) 72.

Criticism of the law in Bell's Commentaries.

common responsibility of the contract for negligence.¹ One man is bound by a notice which has appeared in a newspaper that he has been accustomed to read ;² another, because a large board was stuck up in the coach office ;³ while a third is freed from the effect of the notice in the office because handbills were circulated of a different import.⁴ Then it is said, What if he cannot read ?⁵ or if he does not go himself, but sends a porter, and *he* cannot read ? or what if he be blind, and cannot see the placard ? And thus difficulties multiply, the Courts are filled with questions, and the public left in uncertainty."

Effectual
notice to be
given.

One great safeguard however there was, that in all cases "effectual notice" was necessary. "The rule of law might be superseded in the particular case by a special contract, since *modus et conventio vincunt legem* ; but then such special contract must be proved ; and whether it exists or not is always a question for the jury."⁶

Review of
the cases.

The decisions upon the fact, and the effect of notice and what acts or neglects avoided it, were conflicting and embarrassing ; a review of some of the principal will be sufficient to indicate the course and tendency of them.

Beck v. Evans.

Beck v. Evans⁷ is one of the earliest ; where a cask was delivered to be carried by the defendant's waggon, and nothing was said about the value. While on the road the cask was perceived to be leaking, and the waggoner, though told, paid no attention to its condition, so that the contents—brandy—were lost. Here the conduct of the waggoner was negligence of the grossest character, such as would have fixed even a gratuitous bailee with liability ; consequently he was held answerable.

Levi v.
Waterhouse.

In Levi v. Waterhouse⁸ the point was of more difficulty. A silversmith at Exeter delivered to the defendant's under book-keeper, at the mail-coach office there, a brown-paper parcel, enclosing two hundred guineas, and addressed to London. The under-bookkeeper knew the value of the contents, yet he booked it, signed a receipt for it, and caused it to be put in the banker's bag for greater safety. The parcel was lost. The carrier had given a special notice. Gibbs, C.J., ruled that mere knowledge

¹ Leeson v. Holt, 1 Stark. (N. P.) 186.

² Ibid.

³ Clerk v. Gray, 4 Esp. (N. P.) 177.

⁴ Cobden v. Bolton, 2 Camp. 108.

⁵ A person who can read, and sends a servant who cannot read to sign a contract note under sec. 8 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), is in the same position as if he had signed the note himself: Kirby v. Great Western Railway Company, 18 L. T. (N. S.) 658 ; Foreman v. Great Western Railway Company, 38 L. T. (N. S.) 851.

⁶ Per Lord Ellenborough, C.J., Kerr v. Willan, 2 Stark. (N. P.) 53, at 56, 6 M. & S. 150 ; Davis v. Willan, 2 Stark. (N. P.) 279.

⁷ 16 East 244. Cp. Wilson v. Freeman, 3 Camp. 527 ; Down v. Fromont, 4 Camp. 40 ; Birkett v. Willan, 2 B. & Ald. 356.

⁸ 1 Price (Ex.) 280.

of the value did not waive the notice. His ruling was affirmed in the Court of Exchequer. The decision of the Court of Exchequer does not place the case so high as would appear to be possible from other portions of the report; where it is expressly said to be "proved that the bookkeeper knew the value" of the contents of the parcel. In giving judgment Thomson, C.B., says: "It appears that the bookkeeper might have inferred that this parcel was one of value, but nothing was distinctly said about the actual value, nor did he undertake that the notice should be dispensed with. He did not, therefore, warrant its safe conveyance; and on that ground we think the direction correct." This decision is correct on the ground put by the Court of Exchequer; nor less so if the facts were as stated in the report; since an under-bookkeeper cannot be entitled to vary the published conditions of his master's business.¹ That the decision must not be carried further than this may be gathered from the case of *Bodenham v. Bennett* in the same Court;² where a valuable bank parcel was sent, which was usually carried by the coachman in his side-pocket. When the coach arrived at its destination the bookkeeper unloaded it, received the way-bill, took two parcels out of the front seat of the coach, but did not inquire for the plaintiff's parcel, since it was usually carried by the coachman (who on the day in question was intoxicated); from whom he, therefore, ought to have asked it. The judge left to the jury the question whether there had been gross negligence, which they found. The Court refused to disturb the verdict, being of the same opinion; in which circumstances the fact of the notice did not exonerate from liability.

Judgment of
Thomson,
C.B.

Bodenham v.
Bennett.

An effort to distinguish *Bodenham v. Bennett* was made in *Batson v. Donovan*,³ first, on the ground that the defendant's bookkeeper had knowledge of the contents of the lost parcel. In that view it conflicts with *Levi v. Waterhouse*; since there

Batson v.
Donovan

¹ *Slim v. Great Northern Railway Company*, 14 C. B. 647. Cp. *Page v. Great Northern Railway Company*, 1r. R. 2 C. L. 228; and *Anderson v. Chester and Holyhead Railway Company*, 4 Ir. C. L. R. 435, at 440.

² 4 Price (Ex.) 31; *Garnett v. Willan*, 5 B. & Ald. 53. These cases go to shew that notices were introduced to protect the carrier only from extraordinary events or from his responsibility as insurer, and not from the consequences of the want of due and ordinary personal care and diligence; but in England it has been held that such notices may be used to protect the carrier from the negligence of his servants: *Hinton v. Dibbin*, 2 Q. B. 646; *Peck v. North Staffordshire Railway Company*, 10 H. L. C. 473, at 497; *Manchester, Sheffield, and Lincolnshire Railway Company v. Brown*, 8 App. Cas. 703. So far as the statement in 2 Kent, Comm. 608 is contrary to this it does not express correctly the English law, though it is in accord with the American decisions: *Railroad Company v. Lockwood*, 17 Wall. (U.S.) 357; *Liverpool and Great Western Steam Company v. Phenix Insurance Company*, 129 U.S. (22 Davis) 397, at 439. Mr. Bell contends, 1 Comm. (7th ed.), 501-505, that a notice should not avail to excuse the carrier unless he shews a special agreement to that effect, or evidence not merely of notice but of assent to it. *Post*, 1181.

³ 4 B. & Ald. 21.

the Court laid stress on the fact that the bookkeeper did not "undertake that the notice should be dispensed with."¹ Thus knowledge merely was ineffectual to charge the carrier. Secondly, "it did not appear that the plaintiffs knew of the notice."² As to this the report in *Bodenham v. Bennett* says:³ "The learned judge stated to the jury the common law liability of carriers, and that they might stipulate to restrain it by notice; that they had given such a notice in this case, and therefore the question was, whether there had been gross negligence in the carrying of this parcel." Thirdly, "the Court thought that the parcel was carried beyond its destination, which would make it a case of misfeasance."⁴ Reference to the report will shew that, though the Court inclined to the probability of this view being in fact the correct one, it was not the view on which their judgment was based. Indeed, it must have been considered immaterial, else it would have been left to the jury. *Batson v. Donovan* was decided by the majority of the Court on the ground of a duty to inform the carrier of the contents of the parcel, failure in which was equivalent to fraud, as in the case of *Gibbon v. Paynton*.⁵ A second ground of decision was—that the conduct of the defendant did not amount to gross negligence, and since the carrier's liability was limited by notice, he was not liable for less than this; as the case was decided on the first point only, much stress was not laid upon this second point. As to the first the view of Best, J., which seems the sounder,⁶ was that there is no obligation to communicate to a carrier, unasked, what the contents of a parcel are; since if he makes inquiry he may either know and take what extra precautions are necessary, or, being misled, if loss occurs, may be exonerated on the score of fraud or misconduct.

Grounds of
the decision.

Best, J.'s,
judgment.

Marsh v.
Horne.

In *Marsh v. Horne*⁷ the facts were the same as in *Levi v. Waterhouse*, and there was distinct knowledge on the carrier's part that the value of the goods exceeded £5—the limit in his notice. The King's Bench, following that case, adopted the rule that mere acceptance with knowledge of value on the carrier's part is no waiver of the condition in a notice communicated to the consignor.

Brooke v.
Pickwick.

In *Brooke v. Pickwick*,⁸ in the Common Pleas, it did not appear

¹ *Levi v. Waterhouse*, 1 Price (Ex.) at 285.

² Per Bayley, J., 4 B. & Ald. at 40.

³ 4 Price (Ex.) at 32.

⁴ Per Bayley, J., 4 B. & Ald. at 40; whereas *Batson v. Donovan* "was a case of negligence only, not of misfeasance," per Bayley, J., at 35.

⁵ 4 Burr. 2298.

⁶ *Crouch v. London and North-Western Railway Company*, 14 C. B. 255.

⁷ (1826) 5 B. & C. 322.

⁸ (1827) 4 Bing. 218.

that the plaintiff was apprised of the carrier's notice limiting liability and he was therefore held entitled to recover against the carrier under the common liability as an insurer. The case is interesting for an expression of opinion by Best, C.J.:¹ "I wish, therefore, that these notices had never been holden sufficient to limit the carrier's responsibility. It is too late, however, now to hold that they are without effect where the customer is distinctly informed of their existence. But, though the judges have holden that they will, in such a case, exempt the carrier from his common law responsibility as an insurer, it has never been decided that they will excuse him from the consequences of gross negligence. If the jury find that there was gross negligence, and they could not find otherwise under the circumstances of this case, the trunk having been lost at midday, it is immaterial whether the carrier has been apprised of the value of the article or not. He must have supposed in the present instance, from the size of the trunk and the condition of the passenger, that it was worth more than £5; and where is the line to be drawn if passengers are always to disclose the exact value of their luggage? It would be dangerous to extend to cases of gross negligence the doctrine of modern law, that a carrier is not liable as an insurer where he has given notice to limit his responsibility. . . . I must continue, therefore, to retain the opinion I expressed in *Batson v. Donovan* till the twelve judges decide I am wrong."

Best, C.J.'s,
judgment.

In *Macklin v. Waterhouse*² the same Court decided that a notice, that the proprietor of a general coach office will not be responsible for the carriage of parcels of more than £5 value unless entered as such, will not avail the proprietor of a coach who takes a parcel from the office, unless it be otherwise shewn that he is connected with the office; and, further, that the carrier's agent telling the female servant of the owner of a parcel that it ought to be insured is not a sufficient notice of the limitation of responsibility; while in *Riley v. Horne*,³ decided at the same time, it was held that where there is notice limiting liability for one journey it must be held to apply to the return journey.

Macklin v.
Waterhouse.

Riley v. Horne.

In America the law was somewhat differently construed, and continued to adhere more nearly to the common law strictness of interpretation. The rule laid down in the American decisions is expressed by Nelson, J., in *New Jersey Steam Navigation Company v. Merchants' Bank*:⁴ "He [the carrier] is in a sort of public office, and has public duties to perform, from which he

Law in
America.

Nelson, J., in
New Jersey
Steam Navigation
Company v.
Merchants'
Bank.

¹ L. c. at 223.

² (1828) 5 Bing. 212.

³ 5 Bing. 217.

⁴ 6 How. (U. S.) 344, at 382.

should not be permitted to exonerate himself without the consent of the parties concerned. And this is not to be implied or inferred from a general notice to the public, limiting his obligation, which may or may not be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. And we agree with the Court in *Hollister v. Nowlen*¹ that if any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights and the duties of the carrier as it is that he assented to their qualification. The burden of proof lies on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment. The exemption from these duties should not depend upon implication or inference founded on doubtful and conflicting evidence; but should be specific and certain, leaving no room for controversy between the parties."

The preponderance of American authority seems to be in favour of the following propositions:

Propositions
embodying
the law as to
notice in the
United States.

1. It is competent for a common carrier to limit his common law liability by special agreement with the owner of the goods,² provided the limitation be such as the law can recognize as reasonable and such as is not inconsistent with sound policy.³

2. A common carrier is not permitted to exonerate himself from liability for his own negligence or the negligence of the agents⁴ whom he employs to perform the carriage;⁵ but he is responsible for ordinary neglect—that is, for want of ordinary diligence—notwithstanding a contract to exonerate him.⁶

3. A common carrier may enter into a contract by which the subject-matter of the goods to be carried by him may be taken at an agreed valuation, beyond which sum he will be exonerated from liability even against his own negligence.⁷

In the last case, in the event of loss, "the presumption is

¹ 19 Wend. (N. Y.) 234, per Bronson, J., at 247. Cp. *Cole v. Goodwin*, 19 Wend. (N. Y.) 251.

² *Redfield, Carriers*, §§ 152-167; 2 *Parsons, Contracts* (6th ed.), 233, 237, n.

³ *Express Company v. Caldwell*, 21 Wall. (U. S.) 264; *Railway Company v. Stevens*, 95 U. S. (5 Otto) 655.

⁴ *Liverpool, &c. Steam Company v. Phenix Insurance Company*, 129 U. S. (22 Davis) 379, at 440; *Grace v. Adams*, 100 Mass. 505, 1 Am. R. 131; *M'Kinney v. Jewett*, 24 Hun. (N. Y.) 19.

⁵ *Redfield, Carriers*, §§ 168-179; 2 *Parsons, Contracts* (6th ed.), 238 (n.).

⁶ *Angell*, (5th ed.) *Carriers*, §§ 54, 268; *Christenson v. American Express Company*, 2 Am. R. 122; *Shriver v. Sioux City and St. Paul Railroad Company*, 31 Am. R. 353; *Montgomery, &c. Railroad Company v. Culver*, 51 Am. R. 483.

⁷ *Hart v. Pennsylvania Railroad Company*, 112 U. S. (5 Davis) 331. As to articles of large value in little bulk, the law under sec. 4281 of the Revised Statutes of the United States is the same as it is in England under the Carriers Act, 1830.

conclusive that, if the liability had been assumed on a value as great as that now alleged (*i.e.*, a valuation in excess of the agreed sum in the contract), a higher rate of freight would have been charged. The rate of freight is indissolubly bound up with the valuation. If the rate of freight named was the only one offered by the defendant, it was because it was a rate measured by the valuation expressed. If the valuation was fixed at that expressed, when the real value was larger, it was because the rate of freight named was measured by the low valuation. The plaintiff cannot claim a higher valuation on the agreed rate of freight."¹

We are now in possession of the doctrines of the common law on this point of notice by carriers, limiting or exonerating them from liability. These doctrines are, however, now of the less importance by reason of the legislation that was found necessary to obviate the abuses which grew from them, and which resulted in the passing of the Carriers Act, 1830, regulating the conditions of land carriage. The detailed consideration of the provisions of this Act must accordingly be deferred until we have dealt with other prominent general considerations applicable to the law of common carriers, and are in a position to follow out those more special branches of the subject having exclusive reference to land carriage.²

Common Law as to land carriage modified by the Carriers Act 1830 (11 Geo. IV. & 1 Will. IV. c. 68).

DELIVERY.³

Great part of the difficulties which arise with regard to the law regulating "delivery" are due to the ambiguous signification of the term. Delivery, in the sense with which we are here concerned with it, signifies the transfer of the possession of goods. Delivery, however, often signifies the passing of the property in a chattel, as in *Dixon v. Yates*,⁴ where Parke, J., says: "Where, by the contract itself, the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take

Various significations of the term delivery.

¹ Per Blatchford, J., *Hart v. Pennsylvania Railroad Company*, 112 U. S. (5 Davis) 331, at 337. Cp. *Gibbon v. Paynton*, 4 Burr. 2298; *Batson v. Donovan*, 4 B. & Ald. 21. In English insurance law the rule is the same: "If each of the parties agrees that a certain sum shall be deemed to be of the value of the thing insured, the underwriter, in the case of a total loss, is not to be at liberty to say the thing is not worth so much; he is bound to pay the amount fixed upon, whether it is the proper amount or not. And, on the other hand, the assured is not at liberty to say it is worth more; he is bound by that amount," per Lush, J., *North of England Insurance Association v. Armstrong*, L. R. 5 Q. B. 244, at 250.

² *Post*, 1114.

³ Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), part iii. where the statutory rules as to delivery are set out. By s. 62 "Delivery" means voluntary transfer of possession from one person to another. Cp. Pollock, *On Possession*, 43-46, 57-77; Addison, *Contracts* (9th ed.), 508-525; Abbott, *Merchant Ships* (13th ed.), 445-457; 2 Kent, *Comm.* 496-509; 2 Parsons, *Contracts* (6th ed.), 175-203.

⁴ 5 B. & Ad. 313, at 340.

that specific chattel, and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel, and to pay the price is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee."¹ Delivery is also spoken of as the correlative to the "actual receipt" necessary to give validity to a parol contract for the sale of chattels of the value of £10 or upwards by virtue of 17th sec. of the Statute of Frauds.²

Delivery.

I. To the carrier.

II. By the carrier.

Delivery, so far as it need be considered here, is of two kinds :

I. Delivery to the carrier for the purposes of the carriage.³

II. Delivery by the carrier when the carriage has been completed.

It is only between these periods that the special liability of the common carrier exists, commencing so soon as the common carrier has possession of goods for the purpose of carriage and terminating when his duty to deliver them on the completion of the transit has been discharged.

Generally speaking, it may be said that slighter evidence is sufficient to charge the carrier on delivery to him than is required to discharge him when he is to make delivery on the completion of the transit.

I. Delivery to the carrier.

In one sense it is the reward that renders the carrier liable.

As Sir Edward Coke says, the carrier "hath his hire, and thereby implicitly undertaketh the safe delivery of the goods delivered to him."⁴ This, as we have seen,⁵ must not be construed that unless a reward is fixed beforehand the carrier is not liable. The public profession of the carrier and acceptance of the goods for carriage will create the duty to carry them in accordance with his profession.

I. Delivery to the carrier. A common carrier is bound to receive and carry all goods offered within the limits of his profession and to carry them for a reasonable reward.

¹ Cp. *Heilbutt v. Hickson*, L. R. 7 C. P. 438, at 450; *Kemp v. Falk*, 7 App. Cas. 573, at 586.

² 29 Car. II. c. 3. s. 17 is repealed by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71) s. 4, which re-enacts it with some amendments. The law of what constitutes acceptance under the statute is contained in *Page v. Morgan*, 15 Q. B. Div. 228, and *Taylor v. Smith* (1893), 2 Q. B. 65. Another aspect of delivery is to be found in *Manton v. Moore*, 7 T. R. 67, and the cases there cited; *Goodall v. Skelton*, 2 H. Bl. 316, where in a note cases on delivery are grouped in three classes—(1) What delivery is sufficient to complete the contract, so as to pass the property to the purchaser. (2) What delivery is sufficient to defeat the right of stoppage *in transitu*. (3) What delivery is sufficient to constitute an acceptance of goods under the Statute of Frauds. And see also *Hibbert v. Carter*, 1 T. R. 745. See Benjamin, *On Sale* (4th ed.), 676-678, *Grice v. Richardson*, 3 App. Cas. 319; *Weyand v. Atchison, & Co. Railway Company*, 9 Am. St. R. 504; and a note at 511, "To whom carrier may lawfully deliver property." For Place of Delivery, see 2 Kent, Comm. 505.

³ 56 & 57 Vict. c. 71, s. 32.

⁴ Co. Litt. 89 a; *Dalston v. Janson*, 1 Ld. Raym. 58. ⁵ *Ante*, 921 n. 2, 1056.

Hence, with equal accuracy it may be said that the carrier is liable by reason of his profession, or by reason of the reward ;¹ because the law implies the reward from the exercise of the profession. The carrier must carry for a reasonable amount ; and if the person desiring his goods to be carried avers and proves his readiness to pay a reasonable sum for the carriage, no actual tender of the money is needed.² Neither is it necessary that the compensation should be a fixed sum. It is sufficient if it be in the nature of a *quantum meruit* enuring to the benefit of the carrier.³ The acts to be done by both parties—namely, the receipt of the goods and the payment of a reasonable sum for their carriage—are contemporaneous acts, the carrier being bound to receive the goods on the money being paid or tendered, and the bailor to pay the reasonable amount demanded on the carrier's taking charge of the goods, and the case of *Rawson v. Johnson*⁴ clearly shews that, "whenever a duty is cast on a party in consequence of a contemporaneous act of payment to be done by another, it is sufficient if the latter pay, or be ready to pay, the money, when the other is ready to undertake the duty."⁵

As soon as goods are accepted for the purpose of carriage, the liability of a common carrier attaches. He may in some cases receive goods to warehouse preparatory to the transit ; as he often holds goods as warehouseman after the completion of the transit. The test in these cases, determining in what capacity the carrier holds the goods, is the answer to the inquiry whether the goods are received for deposit in the custody of the carrier as a mere accessory to the carriage, or whether they are in his possession for some independent purpose. In the former case the carrier is liable as common carrier ; in the latter, only as bailee for hire.⁶ The carrier may also give notice, where the goods to be forwarded are within the Carriers' Act, 1830, that he will not be responsible for loss unless an additional sum is paid. If the owner refuses this

When liability attaches.

Test.

¹ *Crouch v. Great Northern Railway Company*, 11 Ex. 742 ; *New Jersey Steam Navigation Company v. Merchants' Bank*, 6 How. (U. S.) 344.

² *Pickford v. Grand Junction Railway Company*, 9 Dowl. (Prac. Cas.), 766 ; *Great Western Railway Company v. Sutton*, L. R. 4 H. L. 226, per Blackburn, J., at 237.

³ *Citizens' Bank v. Nantucket Company*, 2 Story (U. S.) 16. This case is valuable on account of an exceedingly elaborate considered judgment of Story, J., on the nature and extent of the obligations of common carriers.

⁴ 1 East 203 ; *Levy v. Herbert*, 7 Taunt. 314 ; *Waterhouse v. Skinner*, 2 B. & P. 447.

⁵ Per Parke, B., *Pickford v. Grand Junction Canal Company*, 8 M. & W. 372, at 378.

⁶ *Maving v. Todd*, 1 Stark. (N. P.) 72 ; (see the remark on this case and on *Ross v. Johnson*, 5 Burr. 2825, where Lord Mansfield, C.J., is reported as saying, "It is impossible to make a distinction between a *wharfinger* and a *common carrier*. They both receive the goods upon a contract. Every case against a carrier, is like the same case against a *wharfinger*," in 2 Kent, Comm. 600 n. (a) ; *Hyde v. Trent Navigation Company*, 5 T. R. 389 ; *Roskell v. Waterhouse*, 2 Stark. (N. P.) 461 ; *Camden Railroad Company v. Belknap*, 21 Wend. (N. Y.) 354. Ante, 1006.

payment, yet leaves the goods, the liability of the bailee is that of a bailee for hire,¹ and not that of a common carrier. If he makes the payment, the liability becomes that of a common carrier.

What carrier
is bound to
carry.

The carrier is only bound to convey goods he has room for in his carriage,² and which he can carry with security,³ and holds himself out to carry.⁴ In case of dispute, the *onus probandi* is on the plaintiff to establish that the person sought to be charged by him is a common carrier on the ground that the goods conveyed by him are within the true nature and extent of the business in which he holds himself out to the public as engaged.⁴ Yet the carrier is not in every case bound to receive goods tendered to him for carriage even when his profession is to carry goods of the description tendered. A condition is superadded that the goods tendered to him must be fit to be carried in the ordinary course of business; and, if they are not in a fit condition with reference to the ordinary requirements of business, the carrier has an absolute right to refuse them until they are tendered to him in suitable condition.⁵

What
constitutes
delivery.

The principle of what constitutes delivery to a carrier is thus stated in a work of authority: "Whilst it is the undoubted general rule that the delivery, to bind the carrier, must be made either to him, or to some one with authority from him, or who may be rightly presumed to have such authority,⁷ it is not to be understood that it is not subject to such conventional arrangements between the parties as they may choose to make in regard to the mode of delivery, or that it may not be varied by usage or by a particular course of dealing between them. . . . If, therefore, the parties agree that the goods may be deposited for transportation at any particular place, and without any express notice to the carrier, such notice will be a sufficient delivery; and proof of a constant and habitual practice and usage of the carrier to receive the goods when they are deposited for him in a particular place, without special notice of such deposit, is sufficient

¹ Wyld v. Pickford, 8 M. & W. 443. See per Parke, B., Fowles v. Great Western Railway Company, 7 Ex. 699.

² Per Best, C.J., Riley v. Horne, 5 Bing. 217. *Ex parte Robins*, 7 Dowl. (Prac. Cas.) 566; Jackson v. Rogers, 2 Show. (K. B.) 327.

³ Edwards v. Sherrat, 1 East 604, where Lord Kenyon, C.J., said: "All the circumstances and urgency of the case should have been disclosed to the boatman at the time, and he should have been asked whether he chose to undertake the risk. Common honesty would have suggested this, for no man in his senses would, under these circumstances, have taken the corn under a liability as a common carrier."

⁴ Citizens' Bank v. Nantucket Company, 2 Story (U. S.) 16.

⁵ Keddie v. North British Railway Company, 24 Sc. L. R. 172.

⁶ Hutchinson, Carriers, § 90.

⁷ Colepepper v. Good, 5 C. & P. 380; Gilbert v. Dale, 5 A. & E. 543; Camden Railroad v. Belknap, 21 Wend. (N. Y.) 354.

to shew a public offer by the carrier to receive goods in that mode, and to constitute an agreement between the parties, by which the goods when so deposited shall be considered as delivered to him without any further notice. Such a practice and usage are tantamount to an open declaration, a public advertisement, by the carrier that such a delivery should of itself be deemed an acceptance by him; and to permit him to set up, against those who have been thereby induced to omit it, the want of the formality of an express notice, which had been thus waived, would be sanctioning injustice and fraud."

The question of delivery in the individual case must ultimately become a question of fact. The test seems to be whether the parties sought to be charged have themselves or through their agents assumed the charge and custody of the goods.¹ Thus, in the case of a warehouseman, Lord Ellenborough, C.J., in summing up to the jury, said: "The whole question turned upon the single point of, when the warehouseman's liability commenced, and the agency of the carman ended? for until the goods were delivered to the warehouseman, the carman was to be considered as the agent of the person sending them; but when the warehouseman took them into his own hands, the moment the warehouseman applied his tackle to them, from that moment the carman's liability commenced [qu. ceased]."²

Delivery a question of fact.

Thomas v. Day.

Where the goods are placed in the carrier's conveyance without the knowledge or assent of himself or his agents, there is, of course, no delivery.³ It has been held, too, that leaving goods in an inn-yard from whence a carrier sets out is not in law a delivery to the carrier.⁴ The jury have to find the facts, and say whether they amount to a taking in charge (of which the circumstances are as many as the cases)⁵ and which imports the commencement of the carrier's liability. This is subject to the implied exception that the delivery is for the purpose of immediate transportation. If the carrier for his own purposes puts the goods into his warehouse, his liability is still that of carrier. Where, however, the transit is delayed to enable the consignor to give orders as to the

Facts indicating delivery.

¹ Story, Bailm. § 453; Harris v. Packwood, 3 Taunt. 264; Boehm v. Combe, 2 M. & S. 172; Brind v. Dale, 8 C. & P. 207.

² Thomas v. Day, 4 Esp. (N. P.) 262. Ante, 1003. See Roskell v. Waterhouse, 2 Stark. (N. P.) 461; Randleson v. Murray, 8 A. & E. 109; Story, Bailm. § 536.

³ Lovett v. Hobbs, 2 Show. (K. B.) 127; Leigh v. Smith, 1 C. & P. 38.

⁴ 1 Ld. Raym. 46.

⁵ Boys v. Pink, 8 C. & P. 361; Davey v. Mason, Car. & M. 45. An inn where parcels were deposited without express authority was held a receiving-house of the defendants, in Syms v. Chaplin, 5 A. & E. 634. Where goods were delivered at a wharf to an unknown person there, and no knowledge of the fact was brought home to the wharfinger or his agents, it was held no delivery: Buckman v. Levi, 3 Camp. 414. A delivery to a recognized servant is sufficient, as to the mate of a ship: Cobban v. Downe, 5 Esp. (N. P.) 41.

destination, or in any other way for the convenience of the owner, during the time of such delay the liability is not that of a common carrier, but of a warehouseman only. What the exact relation may be is very seldom a matter of specific arrangement between the parties. The determination of the extent of responsibility is inseparable from the preliminary findings of fact, which often are of great indefiniteness, though the governing principles are easily ascertainable.¹

Goods should
be marked.

It is further certain that "goods ought to be plainly and legibly marked, so that the owner or consignee may be easily known; and if in consequence of omitting to do it, without any fault on the part of the carrier, the owner sustain a loss, or any inconvenience, he must impute this to his own fault."²

Finn v.
Western
Railroad
Company.

In an American case, *Finn v. Western Railroad Company*,³ it is said: "A consignor who neglects to give proper directions for the transmission of his goods, has no right to expect that the carrier will take the responsibility of investigating the history of his business in order to ascertain his probable intentions in regard to the particular consignment. The carrier has the right to wait and hold the goods on storage until he receives the proper directions, before he undertakes the severe obligations of that service." In *Bradley v. Dunipace*,⁴ in the Exchequer Chamber, a shipping case, the master was held liable for the wrong delivery of sacks of rye-meal, for which he had given bills of lading, and which were not so marked as to be properly discriminated. But *Bradley v. Dunipace* was not a case where the carrier hesitated to assume the responsibility; for there can be no doubt that a delivery imperfect through defective numbering or addressing of the goods would be sufficient to justify him abstaining from conveying the goods as carrier. The question in that case more particularly was, What was the contract he entered into? and he was held liable because that contract was unperformed. It seems to follow that where a carrier receives goods imperfectly addressed, he thereby, in the absence of any fraud or concealment, undertakes to carry them on the carrier's ordinary terms. In the event of his carrying them, the American case already quoted decides: "The carrier is entitled to have some authority or direction from the consignor himself to justify his delivery to another. If none such accompanies the goods, he is not bound to take the risk of delivery to any one

Bradley v.
Dunipace.

Goods
imperfectly
addressed.

¹ Story, Bailm. § 535; Redfield, Carriers, §§ 95-102; *Judson v. Western Railroad Corporation*, 86 Mass. 520.

² Per Ware, J., *The Huntress*, Davis (U. S. Adm.), 82, at 92.

³ 102 Mass. 283, at 290.

⁴ 1 H. & C. 521.

who does not produce evidence of his title or authority from the consignor."¹

While on this point the effect of delivery to the carrier as between consignor and consignee may be stated in the words of Lord Alvanley, C.J., in *Dutton v. Solomonson*:² "If a tradesman order goods to be sent by a carrier, though he does not name any particular carrier, the moment the goods are delivered to the carrier it operates as a delivery to the purchaser; the whole property immediately vests in him; he alone can bring an action for any injury done to the goods; and if any accident happen to the goods it is at his risk."³

II. Delivery by the carrier.

When goods are arrived at their destination the common carrier has a further duty to deliver. This duty is asserted so far back as the 38th Eliz.,⁴ where Popham, C.J., lays down that "carriers are paid for their carriage, and take upon themselves safely to carry and deliver the things received." As to what the nature of this delivery is, whether it is to be merely at or by the premises of the consignee, or on them and to him, has been sometimes a matter of discussion. In *Golden v. Manning*⁵ where goods were received by the defendants who had a porter to carry out goods, it was held by the Court that the defendants' duties as carriers were "to send notice to persons to whom goods are directed, of the arrival of those goods within a reasonable time, and must take special care that the goods be delivered to the right person." Referring to the special facts of the case, the Court continued: "It was by the negligence of the defendants that the direction of the box was obliterated. The master of a stage coach takes a greater price for the carriage of goods than other carriers, so is certainly bound either to send out the goods from his warehouse in London to be delivered to the persons to whom the same are directed, or to send notice of the arrival thereof within a reasonable time."

II. Delivery by the carrier.
Within what time.

Golden v. Manning.

¹ 102 Mass. at 291. Three New Hampshire cases should be consulted on this: *Stimson v. Jackson*, 58 N. H. 138, on the duty of the carrier when goods are wrongly addressed; *First National Bank of Peoria v. Northern Railroad Corporation*, 58 N. H. 203, on delivery without production of the bill of lading; *Converse v. Boston & Maine Railroad Corporation*, 58 N. H. 521, on ratification of unauthorized delivery. As to failure to receive goods through a strike, see *Pittsburg, &c. Railroad Company v. Hollowell*, 32 Am. R. 63.

² 3 B. & P. 582, at 584. The principal point decided in this case is that where payment for goods is by bill, during the currency of the bill the right to sue for goods sold and delivered is suspended; following *Mussen v. Price*, 4 East 147; *Anderson v. Carlisle Horse Clothing Company*, 21 L. T. (N. S.) 760.

³ This is now regulated in England by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 29, 32. See per Parke, B., *Wait v. Baker*, 2 Ex. 1, at 7; *Mirabita v. Imperial Ottoman Bank*, 3 Ex. Div. 164; *Great Western Railway Company v. Bagge*, 15 Q. B. D. 625; *Dawes v. Peck*, 8 T. R. 330; also per Lord Chelmsford, *Shepherd v. Harrison*, L. R. 5 H. L. 116, at 127.

⁴ (1596) Owen 57.

⁵ (1773) 3 Wils. (C.P.) 429, at 433.

Hyde v. Trent
and Mersey
Navigation
Company.

In *Hyde v. Trent and Mersey Navigation Company*¹ there was considerable discussion as to whether the carrier was bound to deliver to the consignee at his house, or whether he discharged himself by delivery to a porter at the inn at the place of destination. Three of the judges² adopted the view that carriers were obliged to see the goods carried home to their place of destination. Lord Kenyon, C.J., however, expressed great doubts on the point. "On more recent occasions," says Story,³ "the opinions of other distinguished judges have settled down in favour of the three judges against him; and Kent⁴ says: "The actual delivery to the proper person is generally conceded to be the duty of the carrier."

Storr v.
Crowley

Garrow, B.,
in opinion.

The case of *Storr v. Crowley*⁵ is very similar in its facts to *Golden v. Manning*, and, like that case, was decided on the narrowest basis possible. Garrow, B., however, says in his judgment:⁶ "According to the usual course of transactions, such as the present, it seems to me that the person who undertakes to carry an article from one individual to another, does so in consideration of a reward to deliver it at the house of that individual. With regard to presents in particular, that must be the case, because commonly no notice is given to the party for whom they are intended."

Ware, J., in
The Huntress.

To the same effect are the observations of Ware, J., in *The Huntress*.⁷ "Among the obligations which common carriers take upon themselves as resulting from the nature of their employment is that of delivering the goods, when they are transported to the place of destination to the proper person. If they are delivered to a wrong person, and any loss or damage ensues in consequence, they are responsible to the owner."

¹ (1793) 5 T. R. 389. See *Constable v. National Steamship Company*, 154 U. S. (47 Davis) 51, at 60.

² Ashhurst, Buller, and Grose, J.J.

³ *Bailments*, § 543. Story's own view is: "*In contractibus tacite veniunt ea, quæ sunt moris et consuetudinis* (Pothier, *Traité du Contrat de Louage*, n. 57, and see per Tindal, C.J., *Moon v. Guardians of the Witney Union*, 3 Bing. N. C. 814, at 818). But in the absence of any special contract, or custom, or usage, probably no general rule can be laid down." *Rowe v. Pickford*, 8 Taunt. 83, was the case of a consignee of goods sent by a common carrier to London, who, having no warehouse of his own, was accustomed to leave the goods in the waggon, office or warehouse of the common carrier; the Court held, with reference to stoppage *in transitu*, that the transit was at an end when the goods were received and placed in the warehouse. In *In re Webb*, 8 Taunt. 443, common carriers agreed to carry wool from London to Frome, stipulating that when the consignees had not room in their own store to receive it, the carriers, without additional charge, would retain it in their own warehouse until the consignee was ready to receive it. Wool thus carried and placed in the carrier's warehouse was destroyed by an accidental fire. The Court held, that they held these goods not as carriers but as warehousemen, and so were not liable, "for this is a loss which would fall on them as carriers if they were acting in that character, but would not fall on them as warehousemen, if they were acting in the character of warehousemen." Cp. *Fisk v. Newton*, 1 Denio (N. Y.) 45; *Clendaniel v. Tuckerman*, 17 Barb. (N. Y.) 184. *Ante*, 1089.

⁴ 2 Comm. 604.

⁵ *M'Cle. and Y.*, at 137.

⁶ (1825) *M'Cle. & Y.* 129.

⁷ (1840) *Daveis* (U. S. Adm.), 82, at 86.

Whatever doubts may at one time have been entertained as to the carrier's duty to deliver it is now too late to call it in question. The existence of such a duty must be taken as incontestable—a duty founded in long custom, but, like most others, susceptible of variation to almost any extent by apt words of agreement, or even by tacit understanding. In the absence of this, however, the duty of the carrier would appear to be to deliver on the premises and not outside them, in such manner as not to cause nuisance or obstruction and either to the consignee or to one *prima facie* his agent. He is certainly not required (and this was held in an un-
Not required to carry goods upstairs in the house where delivery is made.

reported case before Cave, J., in the spring of 1891) to carry the goods upstairs at the place of their delivery for their more convenient disposition; and if the carrier's servant on request does this, it is to be regarded as a mere voluntary courtesy on his part, and the master is not chargeable for injury caused by the servant's negligence to the goods while thus being carried.

The time of delivery has, however, nothing to do with the duty to deliver safely. Where there is an express contract, the terms of the contract of course govern; where there is no express contract, there is an implied contract to deliver within a reasonable time; "the duty to deliver within a reasonable time being merely a term engrafted by legal implication upon a promise or duty to deliver generally,"¹ and this delivery must be without unnecessary deviation.² So that where a railway company was prevented from delivering a parcel of goods, by an accident on its line resulting from the negligence of another company which had running powers, the Common Pleas held, in *Taylor v. Great Northern Railway Company*, that the railway company were not liable for damage to the goods by the delay.³ Shortly after the same Court held, in *Lord v. Midland Railway Company*,⁴ that a contract to carry by a particular train does not amount to a warranty that the goods shall arrive at the usual hour for the
Time of delivery.

¹ Per Tindal, C.J., *Raphael v. Pickford*, 5 M. & G. 551, at 558.

² Per Tindal, C.J., *Davis v. Garrett*, 6 Bing. 716, at 725. In *Lavabre v. Wilson*, 1 Dougl. 284, at 291, Lord Mansfield says: "A deviation from necessity must be justified both as to substance and manner. Nothing more must be done than what the necessity requires. The true objection to a deviation is not the increase of the risk. If that were so, it would only be necessary to give an additional premium. It is, that the party contracting has voluntarily substituted another voyage for that which has been insured." What constitutes "necessity" is elaborately discussed in *Phelps v. Hill* (1891), 1 Q. B. 605. A deviation has been defined "a voluntary departure without necessity or reasonable cause from the regular and usual course" of a voyage. . . . But it is no deviation in respect of such a voyage to touch and stay at a port out of its course, if such departure is within the usage of trade: *Hostetter v. Park*, 137 U. S. (30 Davis) 30, at 40; *Constable v. National Steamship Company*, 154 U. S. (47 Davis) 57, at 67. See *Leduc v. Ward*, 20 Q. B. Div. 475, approved *Glynn v. Margetson* (1893), App. Cas. 351, where the effect of printed words in a bill of lading is indicated. See *Abbott, Merch. Ships* (13th ed.), 406.

³ L. R. 1 C. P. 385; *Briddon v. Great Northern Railway Company*, 28 L. J. Ex. 51. As to reasonable time, *ante* 1010.

⁴ L. R. 2 C. P. 339.

arrival of the train by which they are sent, even though at the time of receiving the goods the company's servants are informed that the object of the sender requires them so to arrive.

Mode of
delivery.

Rooth v.
North-Eastern
Railway
Company.

The carrier is bound to provide a safe and proper means for delivery. If, as in *Rooth v. North-Eastern Railway Company*,¹ the defendants undertake to carry cattle, there is an obligation to provide a safe and proper means for these cattle to cross the company's line and to leave the premises. Two questions were there left to the jury—Was there a complete and safe delivery? and, Was there a proper place to deliver? Commenting on this, Kelly, C.B., said:² "The one question involves the other. The question, that is, of safe and complete delivery, involves that of whether a safe and convenient place to deliver was provided." The Chief Baron's view is, however, not perfectly accurate. Undoubtedly a safe and complete delivery would ordinarily render unnecessary the consideration of whether a safe and convenient place to deliver was provided. Yet the possibility is not excluded of the safe and complete delivery being made in an unsafe and inconvenient place necessitating extra expense and precautions to carry it out. On this hypothesis the carrier would seem to be liable for all extra expenses necessarily or reasonably incurred by his default. Kelly, C.B., further pointed out³ that in *Roberts v. Great Western Railway Company*⁴ the defendants succeeded because the declaration in that case contained an express allegation of an absolute legal obligation to provide a fence to a yard near a railway station, and it was impossible to say that that as a matter of law was the special precaution that must necessarily be taken.

Roberts v.
Great Western
Railway
Company.

What is
delivery.

Shepherd v.
Bristol and
Exeter Rail-
way Company.

The circumstances which constitute delivery were the subject of discussion in *Shepherd v. Bristol and Exeter Railway Company*,⁵ where the Court were divided in opinion. Cattle delivered by the plaintiff to the defendants, and carried by them as common carriers, arrived at the defendants' station on a Sunday morning, between eleven and twelve o'clock. Owing to certain police regulations the plaintiff was unable to take them away before midnight. They arrived and were taken out of the trucks safely. The plaintiff's servant was at the station, and would at once have driven them away but for the regulations. They were put into a pen, where the plaintiff, who subsequently came, fed them, buying the hay of the railway company's foreman. Between twelve and

¹ L. R. 2 Ex. 173; distinguished *Harris v. Midland Railway Company*, 25 W. R. 63.

² L. R. 2 Ex. at 179.

³ L. c. at 180.

⁴ 4 C. B. N. S. 506.

⁵ L. R. 3 Ex. 189. Cp. *McKinney v. Jewett*, 90 N. Y. 267, the case of some hams spoiled while waiting at the defendant's station.

one o'clock on Monday morning, when plaintiff's servant went to fetch them, he found that two had been killed. He desired to take the remaining twenty, but was not allowed to do so unless he signed for the lot. This he refused to do, and in consequence was not permitted to take any. The majority of the Court of Exchequer¹ held that "nothing more remained to be done by the defendants under their contract as carriers when the alleged damage occurred." Martin, B., considered the matter "a pure question of fact,"² and that the cattle were "not delivered either actually or constructively." The question would seem largely to turn on what was the ordinary course of business,³ and would therefore ordinarily have been for the jury; in this particular case the Court had the power to draw inferences of fact, and two judges drew one inference, one another.

The Supreme Court of the United States considered the question of the carrier's duty in the delivery of cattle before them in *North Pennsylvania Railroad Company v. Commercial Bank of Chicago*.⁴ "A railroad company," it is said in the judgment,⁵ "it is true, is not a carrier of live stock with the same responsibilities which attend it as a carrier of goods. The nature of the property, the inherent difficulties of its safe transportation, and the necessity of furnishing to the animals food and water, light and air, and protecting them from injuring each other, impose duties in many respects widely different from those devolving upon a mere carrier of goods. The most scrupulous care in the performance of his duties will not always secure the carrier from loss. But, notwithstanding this difference in duties and responsibilities, the railroad company, when it undertakes generally to carry such freight, becomes subject, under similar conditions, to the same obligations, so far as the delivery of the animals which are safely transported is concerned, as in the case of goods. They are to be delivered at the place of destination to the party designated to receive them if he presents himself, or can with reasonable efforts be found, or to his order. No obligation of the carrier, whether the freight consists of goods or of live stock, is more strictly enforced.⁶ If the consignee is absent from the place of destination, or cannot, after reasonable inquiries, be found, and no one appears to represent him, the carrier may place the goods in a warehouse or store with a responsible person, to be kept on account of and at the expense of the owner. He cannot release

North
Pennsylvania
Railroad
Company v.
Commercial
Bank of
Chicago.

¹ Bramwell and Channell, BB.

² *Stephenson v. Hart*, 4 Bing. 476.

³ 123 U. S. (16 Davis) 727. *Post*, 1140.

² L. R. 3 Ex. at 195.

⁵ *L. c.* per Field, J., at 734.

⁶ *Forbes v. Boston and Lowell Railroad Company*, 133 Mass. 154; *McEntee v. New Jersey Steamboat Company*, 45 N. Y. 34.

himself from responsibility by abandoning the goods or turning them over to one not entitled to receive them.¹ If the freight consist, as in this case, of live stock, the carrier will not, under the circumstances mentioned, that is, when the consignee is absent or cannot after reasonable inquiries be found, and no one appears to represent him, relieve himself from responsibility by turning the animals loose. He must place them in some suitable quarters where they can be properly fed and sheltered, under the charge of a competent person or his agent, or for account and at the expense of the owner. Turning them loose without a keeper, or delivering them to one not entitled to receive them, would equally constitute a breach of duty, for which he could be held accountable."²

Distinction between ordinary road carriers and railway carriers.

There is apparently a difference between ordinary road carriers and railway carriers in discharging the duty of delivering goods carried.³ In *Hyde v. Trent and Mersey Navigation Company*⁴ the majority of the Court were of opinion that the risk of the carrier continued until a personal delivery at the house or place of deposit of the consignee with notice. With railway companies the rule is otherwise.⁵ The trucks cannot leave the line of rails on which they move, while if they are drawn up on the line they necessarily obstruct other traffic; so that it is often essential that they should be unloaded, without waiting for instructions or intervention from those to whom their contents belong. Hence arises, as an almost inseparable incident to a railway company's business, the necessity for large warehouses for the storage of goods pending delivery. The contract made by railway carriers of goods is accordingly modified from that of ordinary road carriers, and may be thus stated: They contract to "carry the goods safely to the place of destination, and there discharge them on the platform, and then and there deliver them to the consignee or party entitled to receive them, if he is there ready to take them forthwith; or, if the consignee is not there ready to take them, then to place them securely and keep them safely a reasonable time ready to be delivered when called for."⁶

Rule of duty laid down by *Shaw, C.J.*, in *Norway Plains Company v. Boston Railroad*.

¹ *Fisk v. Newton*, 1 Denio (N. Y.) 45.

² See Angell, Carriers (5th ed.), § 291; also 2 Kent, Comm. 500 *et seqq.*, as to symbolical delivery.

³ This is probably due to the fact that the railway Acts originally contemplated the charge of tolls for use of the road, and that carriers by rail would use their own waggons. When the companies became carriers, their right to deliver depended on their special Act, and the charges for delivery at the consignee's door rested on the right to make terminal charges. See *Hall v. London, Brighton and South Coast Railway Company*, 15 Q. B. D. 505.

⁴ 5 T. R. 389.

⁵ *Thomas v. Boston and Providence Railroad Company*, 51 Mass. 472; *South and North Alabama Railroad Company v. Wood*, 41 Am. R. 749.

⁶ Per Shaw, C.J., in *Norway Plains Company v. Boston and Maine Railroad*, 67 Mass.

Actual delivery to the proper person is generally conceded to be the duty of the carrier.¹ If the carrier has delivered to the wrong person, he is *prima facie* guilty of a conversion.² But, says Kelly, C.B., in *Heugh v. London and North-Western Railway Company*,³ referring to the cases just cited, "in neither case was it held, or even contended, that the mis-delivery amounted, as a matter of law, to a conversion; but in both cases it was admitted to be a question for the jury—and the question was, in fact, left to them—whether under all the circumstances the defendants had acted with reasonable care." This and similar decisions turn

Duty of the carrier actually to deliver.

Heugh v. London and North-Western Railway Company.

263, at 272. *Rice v. Boston and Worcester Railroad Corporation*, 98 Mass. 212. As to the liability of taking goods to a port beyond their proper destination, *Ellis v. Turner*, 8 T. R. 531.

¹ *Smith v. Horne*, 8 Taunt. 144; *Garnett v. Willan*, 5 B. & Ald. 53; *Duff v. Budd*, 3 B. & B. 177. As to constructive delivery by carrier, *Tarbell v. Royal Exchange Shipping Company*, 110 N. Y. 170, 6 Am. St. R. 350.

² *Stephenson v. Hart*, 4 Bing. 476; *Duff v. Budd*, 3 B. & B. 177. The definition of conversion is "a wrongful interference with goods, as by taking, using, or destroying them, inconsistent with the owner's right of possession." To charge conversion there must be an act of the defendant's repudiating the owner's right or some exercise of dominion inconsistent with it: *Fouldes v. Willoughby*, 8 M. & W. 540; *Hiort v. Bott*, L. R. 9 Ex. 86. The mere case of assuming to buy or assuming to sell without possession or the power of exercising a direct control over the property assumed to be dealt with, or without at least the existence of some ostensible title by means of which the person so assuming detains it from the rightful owner, or by transferring which he has enabled another to obtain and dispose of such property, does not constitute a conversion: *Dickey v. M'Caul*, 14 Ont. App. 166, where the English cases are marshalled. *Ante*, 905. As to the law affecting conversion, see the opinion of Blackburn, J., in *Hollins v. Fowler*, L. R. 7 H. L. 757, at 726. *Bullen and Leake, Prec. of Plead.* (3rd ed.), 290 *et seqq.*; *Bigelow, L. C. on Torts, note on Conversion*, 420-453. For an inquiry into the elements to be taken into account in arriving at the rule of damages for conversion where there is a *bona fide* mistake of the owner's rights, and of the duty of the injured party to repurchase "in a reasonable time," with a consideration of what is "a reasonable time" to repurchase in, see *Wright v. Bank of Metropolis*, 110 N. Y. 237, 6 Am. St. R. 356. *Ante*, 1010. In England the rule as to damages recoverable for conversion of chattels severed and carried away has most frequently been discussed in cases of the wrongful severance of coal. The conclusions arrived at seem to be as follows: 1. Where the act is that of a wilful trespasser the full value of the property may be recovered at the time and place of demand, or of suit brought with no allowance for labour and expense incurred by the wrongdoer; 2. Where the act is that of an unintentional or mistaken trespasser, or of an innocent vendee from such trespasser, the value at the time of conversion less the amount added thereto by the trespasser or his vendor; 3. Where there is a purchase without notice of wrong from a wilful trespasser, the value at the time of such purchase. Lord Macnaghten traces the development and history of the law in *Peruvian Guano Company v. Dreyfus Bros.* (1892), App. Cas. 170, n., at 174. *Livingstone v. Rawyards Coal Company*, 5 App. Cas. 25; *Wood v. Morewood*, 3 Q. B. 440 n.; *Jegon v. Vivian*, L. R. 6 Ch. 742; *Wooden-Ware Company v. United States*, 106 U. S. (16 Otto) 432. As to nominal damages for conversion, see *Hiort v. London and North-Western Railway Company*, 4 Ex. D. 188. The test whether substantial, or nominal damages merely, are recoverable for a conversion is thus stated in *Johnson v. Stear*, 15 C. B. N. S. 330, at 340. by Williams, J.: "The true doctrine, as it seems to me, is, that whenever the plaintiff could have resumed the property, if he could lay his hands on it, and could have rightfully held it when recovered as the full and absolute owner, he is entitled to recover the value of it as damages in the action of trover, which stands in the place of such resumption"; approved by Bramwell, L.J., *Mulliner v. Florence*, 3 Q. B. Div. 484, at 491. Cp. *Armstrong v. Allan*, 8 Times L. R. 613. To constitute a conversion, a general demand for the return of goods is not sufficient: *Nixon v. Sedger*, 7 Times L. R. 112 (C. A.). Conversion is considered at length in *Velasian v. Lewes*, 3 Am. St. R. 184, and note; and in *Bolling v. Kirby*, 24 Am. St. R. 789; while in the note 795-819, there is an immense collection of cases on every aspect of this branch of law.

¹ L. R. 5 Ex. 51, at 57.

Mere wrong
delivery not
sufficient to
support a
claim for
conversion.

upon the fact that the transit has been completed, and the carrier has done all he could to secure delivery; so that the character in which he holds the goods is changed from that of an insurer to that of a less onerous responsibility.¹ To make him liable there must be some fault; and it is a question of fact whether there has been any such negligence as makes him guilty of a conversion; and where he has carried out the directions of the sender, the mere circumstance that he has delivered the goods to some person to whom the sender did not intend delivery to be made is not sufficient to support the allegation that he has converted them.² The proposition would, perhaps, be more strictly accurate put in another way. The liability of the carrier having been terminated by the fulfilment of the contract, the substituted contract requires some negligence in order to fix the bailee of the goods with responsibility for their mis-delivery; and, until negligence is shewn, it does not follow that acts, which in law in the abstract point to conversion, necessarily affix liability to the bailee with the special features of the particular case. This may be tested by assuming a similar mis-delivery while the carrier's liability is subsisting. The carrier is liable in trover for the mis-delivery.³

Where carrier
holds goods
in another
capacity than
that of carrier.

Where the carrier holds the goods in another and less onerous capacity than that of carrier, he is not liable. This cannot depend upon the facts shewing conversion in one case and not a conversion in the other; for the facts, by hypothesis, are the same; and "conversion" is a conclusion of law deduced from ascertained facts.⁴ If, then, the bailee holds the goods in one capacity—as carrier—he is liable for a conversion; if he holds them in another capacity—as warehouseman—he is not; the facts are the same in each instance, so far, that is, as they relate to the alleged converting. Therefore it is not the question of conversion which is for the jury, but the question in what capacity the defendant holds the goods; and, if in the capacity of bailee, whether as depositary or as bailee for hire; then, has his conduct been negligent to such a degree as would affix a responsibility to him in a case where he is not necessarily, and in all events, liable? Actual delivery, of course, cannot be insisted on in all cases: circumstances may imply it; it may be waived; it may be impossible.

¹ See *post*, 1103.

² *M'Kean v. M'Ivor*, L. R. 6 Ex. 36; *Samuel v. Cheney*, 135 Mass. 278, at 283, in the judgment, is said to be "in some respects similar." See also *Southern Express Company v. Van Meter*, 35 Am. R. 107.

³ *Youl v. Harbottle, Peake* (N. P.) 64, cited by Bayley, J., in *Devereux v. Barclay*, 2 B. & Ald. 703, at 704; *Wyld v. Pickford*, 8 M. & W. 443. As to what constitutes a mis-delivery, see *Cunnington v. Great Northern Railway Company*, 49 L. T. 392.

⁴ *Hollins v. Fowler*, L. R. 7 H. L. 757. As to a conversion of baggage, see *McCormick v. Pennsylvania Railroad Company*, 99 N. Y. 65.

The law of England with regard to goods does not differ from what it has been decided to be with regard to passengers' luggage,¹ though there is no decision precisely in point—that the responsibility does not terminate until the owner or consignee might reasonably have an opportunity to remove it,² if, that is, there is a contract or a custom for him to do so. If, however, the owner neglects his opportunity, he cannot thereby impose a greater burthen³ on the carrier than he is liable to if the owner did what he ought. The test is whether in the circumstances the consignee has used reasonable diligence to ascertain whether the goods are arrived, and (if they are) to remove them before the responsibility of the carrier is terminated. When this reasonable interval is elapsed, the carrier's obligation ceases, and he only remains liable as bailee.⁴

Termination of responsibility.

"When once," says Cockburn, C.J.,⁵ speaking of railway carriers, "the consignee is *in mora* by delaying to take away the goods beyond a reasonable time, the obligation of the carrier becomes that of an ordinary bailee, being confined to taking proper care of the goods as a warehouseman; he ceases to be liable in case of accident." What will amount to reasonable time is sometimes a question of difficulty, but as a question of fact, not of law. As such, it must depend on the circumstances of the particular case."⁷

Cockburn, C.J., in *Chapman v. Great Western Railway Company*.

It seems, then, that the same contract at different times may import different liabilities to those entrusted with goods.⁸ A further distinction must be drawn between those cases where the continued custody of the goods is for the convenience of the carrier, and those cases where the custody is not incident necessarily to the carriage, and is for the convenience or through the negligence of the bailor. In the former class the liability continues that of the common carrier. In the latter it is that of a mere bailee.

Distinctions.

Yet a further distinction has been drawn, in this latter class of cases, between the cases where the bailment is a bailment for hire, and those where it is held as a mere deposit. There can be no doubt that a common carrier or other bailee for hire may refuse to enter into any new contract for keeping goods after he has completed his undertaking for the carriage of them and has dis-

On what terms goods remain after termination of carrier's responsibility.

¹ *Post*, 1215 *et seqq.*; *Hodkinson v. London and North-Western Railway Company*, 14 Q. B. D. 228; *McCarty v. New York and Erie Railroad Company*, 30 Pa. St. 247.

² *Great Western Railway Company v. Crouch*, 2 H. & N. 491, 3 H. & N. 183.

³ *Chapman v. Great Western Railway Company*, 5 Q. B. D. 278.

⁴ *Thomas v. Boston and Providence Railroad Corporation*, 51 Mass. 472. Cp. *Cairns v. Robins*, 8 M. & W. 258.

⁵ *Chapman v. Great Western Railway Company*, 5 Q. B. D. 278, at 282.

⁶ *I.e.*, as distinguished from negligence.

⁷ See *ante*, 1010.

⁸ *Garside v. Trent and Mersey Navigation*, 4 T. R. 581; *Hyde v. Trent and Mersey Navigation Company*, 5 T. R. 389.

charged himself from responsibility by a delivery of the goods to the bailor, or by tender of them, or by some other act which the law regards as delivery.¹ If he does this, it is said in an American case of authority,² the goods remain with him as an involuntary depositary; for he has discharged his duty to the owner, which is—failing actual delivery, which he cannot compel—to do what is fairly equivalent to a delivery;³ and has refused to undertake any further obligation to him. There does not then appear to be any distinction between his position and the position of a mere finder of goods.⁴ He may suffer them to remain undisturbed, or he may remove them to a convenient distance and there leave them in a suitable place for the owner, doing no unnecessary damage; he will then incur no responsibility.⁵

Hudson v.
Baxendale.

In *Hudson v. Baxendale*,⁶ however, the rule was laid down apparently more in favour of the owner. There Bramwell, B., said: "The true rule is, that when a consignee refuses to accept a parcel tendered to him by a carrier, the carrier must conduct himself as a reasonable man would do with reference to it. I doubt if a consignor has a right to impose on a carrier the burden of doing anything after he has tendered the goods. But, assuming that he has, it is sufficient if the carrier does what is reasonable."

Great Western
Railway
Company v.
Crouch.

The question then arises—As a reasonable man, with respect to what standard? This was answered by Willes, J., in *Great Western Railway Company v. Crouch*,⁷ in the Exchequer Chamber; when, after referring with approbation to the decision in *Hudson v. Baxendale*, he said: "Generally speaking, dealing with a parcel under such circumstances in a reasonable manner will impose upon the carrier the duty of keeping it for a reasonable time, if he has the means of doing so, at the place to which it was originally consigned." And Crompton, J., considered that, "according to the general law, where a carrier undertakes to carry goods to a particular place he must deposit them for a reasonable time, if the consignee is not ready to receive them." This Willes, J.,⁸ agreed was the correct rule. That being so, it seems that not every hasty refusal must be taken by the carrier as irrevocable, but a *locus penitentiae* must be given. The consignee, whether

¹ *Heugh v. London and North-Western Railway Company*, L. R. 5 Ex. 51.

² *Smith v. Nashua and Lowell Railroad Company*, 27 N. H. 86.

³ *Ostrander v. Brown*, 15 Johns. (Sup. Ct. N. Y.) 39; *Story, Bailm.* § 543; *Angell, Carriers* (5th ed.), § 289; *Patten v. Johnson*, 131 Mass. 297, is a case on what amounts to waiver of delivery.

⁴ *Ante*, 904.

⁵ *Fisk v. Newton*, 1 Denio (N. Y.) 45; *Cope v. Cordova*, 1 Rawle (Pa.) 203, in which cases the law is exhaustively considered and the English cases referred to.

⁶ 2 H. & N. 575.

⁷ L. c. at 581.

⁸ L. c. at 197.

⁹ 3 H. & N. 183, at 202.

¹⁰ L. c. at 202.

refusing acceptance or not, is to have his reasonable time for the purposes of getting delivery. After the expiry of this time, the position of the carrier may be that of an involuntary depository; still, he must act reasonably with regard to the subject-matter and to the circumstances.

In *Mitchell v. Lancashire and Yorkshire Railway Company*,¹ Blackburn, J., said: "I take it the law is very clear to this extent, that where a carrier receives goods to carry to their destination with a liability as carrier (except so far as that duty is qualified by exceptions), he may be said to be an insurer. The goods are then to be carried at the risk of the carrier to the end of the journey, and, when they arrive at the station to which they were forwarded, the carrier has then complied with his duty *when he has given notice to the consignee of their arrival*." And after this notice, and the consignee does not fetch the goods away and becomes *in mora*, then I think the carrier ceases to incur any liability as carrier, but is subject to the ordinary liability of bailee."²

The natural meaning of this passage seems to be that there is a duty on the railway carrier to give notice to the consignee; though the expression is susceptible of the meaning that the giving notice to the consignee would be the clearest and most emphatic way of shewing that he has had reasonable opportunity to remove his goods, without laying down as an absolute rule of law that the giving of notice is a *conditio sine qua non* of reasonable opportunity. Blackburn, J., also leaves ambiguous the answer to the question, what sort of bailee's liability it is that is incurred—that of the bailee for hire, or that of the involuntary depository? In the case before him there was no dispute as to which; for if the defendants were not liable as carriers, then their liability was that of warehousemen. "I think in this case the railway company in holding these goods could have charged warehouse rent; and, that being so, I think there can be no doubt that *prima facie* there was a liability in them as bailees for reward. The liability of an ordinary bailee is to take ordinary and reasonable care."³ As the case did not raise the question whether in any circumstances the liability of the carrier may not be only that of an involuntary depository, Blackburn, J., does not discuss it. Probably in the existing state of opinion, and with the present methods of the conduct of railway business, the

Mitchell v. Lancashire and Yorkshire Railway Company.
Blackburn, J.'s judgment.

Suggested solution of the difficulty.

¹ L. R. 10 Q. B. 256.

² L. c. at 260.

³ In *Hudson v. Baxendale*, 2 H. & N. 575, the Court held that notice, as a matter of law, was not necessary.

⁴ *Bourne v. Gatcliffe*, 4 Bing. N. C. 314, 3 M. & G. 643, 11 Cl. & F. 45; *Cairns v. Robins*, 8 M. & W. 258. See Sale of Goods Act 1893 (56 & 57 Vict. c. 71), s. 45.

⁵ L. R. 10 Q. B., at 260.

question is not likely practically to be raised. Assuming, however, reasonable notice given of the arrival of goods, and omission to remove them, with a further distinct notice that the carrier repudiates all liability with regard to them, there seems no reason why the liability of the carrier should be other than that of an involuntary bailee.¹

Right to
warehouse
goods.

As to the right to put goods in warehouse, there seems to be, says a high authority,² "no question but that the carrier will be justified," in so disposing of goods not called for in a reasonable time.

Retention of
the goods.

Again, the carrier may refuse to undertake any new duties with respect to the goods, yet he may continue to retain them in his hands without any further contract. In such a case the law implies that the goods are held by him as a depositary; and he is liable for gross negligence, and is bound to the exercise of slight care, such as is taken by a man of common-sense of his own property.³ Further, though he has at first refused to undertake any responsibility with regard to the goods, he may subsequently so act that he may become bound by the same contract into which he has at first refused to enter; and this liability may be either that of a depositary or of a bailee for hire; the question of which will be a question of fact, and for the jury.⁴

Duty of carrier
where he is
required to
hold the goods
when such
holding
involves
expense.
Notara v.
Henderson.

There is one point more—What is the duty of the carrier during the time he is required to hold the goods pending the taking of delivery of them by the consignee, when the holding of them either necessitates expense or renders it expedient? In the well-known case of *Notara v. Henderson*,⁵ in the Exchequer Chamber, with reference to shipowners, it was held that there is a duty imposed upon the master, as representing the shipowner, to take reasonable care of the goods entrusted to him, not merely in doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage, but also in taking reasonable measures to check and arrest their loss, destruction, or deterioration by reason of accidents, for the

¹ *Clark v. Eastern Railroad Company*, 139 Mass. 423, holds in certain circumstances a railway company may be a gratuitous bailee of baggage brought to be conveyed with a passenger. *Ante*, 909. As to carriage "at owner's risk," see *Wood v. Burns*, 20 Rettie 602, where an organ carried upon special terms, while being landed from the carrier's vessel slipped and was smashed.

² *Redfield, Carriers*, § 121. In *National Steamship Company v. Smart*, 107 Pa. St. 492, where the liability of carrier has ceased, the goods are said to be held on the obligation "to exercise ordinary care in keeping and preserving" them. *Ante*, 998. As to "ordinary care," *ante*, 911.

³ *In re Webb*, 8 Taunt. 443; *Hyde v. Trent and Mersey Navigation*, 5 T. R. 389; *Garside v. Trent and Mersey Navigation*, 4 T. R. 581; *Chapman v. Great Western Railway Company*, 5 Q. B. D. 278.

⁴ *Smith v. Nashua and Lowell Railroad Corporation*, 27 N. H. 86; *Cairns v. Robins*, 8 M. & W. 258; *White v. Humphery*, 11 Q. B. 43.

⁵ 1 R. 7 Q. B. 225.

necessary effects of which there is, by reason of the exception in the bill of lading, no original liability.¹ *Notara v. Henderson* was followed by *Cargo ex Argos, Gaudet v. Brown*,² also a shipping case, where Sir Montague Smith, delivering the judgment of the Privy Council, after citing the cases, proceeds thus:³

“It results from them that not merely is a power given, but a duty is cast on the master, in many cases of accident and emergency to act for the safety of the cargo in such manner as may be best under the circumstances in which it may be placed; and that, as a correlative right, he is entitled to charge its owner with the expenses properly incurred in so doing.” Referring to this in *Great Northern Railway Company v. Swaffield*,⁴ the case of a land carrier, Pollock, B., says: “That seems to me to be a sound rule of law. That the duty is imposed upon the carrier I do not think any one has doubted; but if there were that duty without the correlative right, it would be a manifest injustice.” Kelly, C.B., in the same case—that of a horse received at a station, and no consignee appearing, being sent on to a livery stable keeper, for whose charges the company sued—said: “My brother Pollock has referred to a class of cases which is identical with this in principle, where it has been held that a shipowner who, through some accidental circumstances, finds it necessary for the safety of the cargo to incur expenditure is justified in doing so, and can maintain a claim for reimbursement against the owner of the cargo. That is exactly the present case. The plaintiffs were put into much the same position as the shipowner occupies under the circumstances I have described. They had no choice, unless they would leave the horse at the station or in the high road to his own danger and the danger of other people, but to place him in the care of a livery stable keeper, and, as they are bound by their implied contract with the livery stable keeper to satisfy his charges, a right arises in them against the defendant to be reimbursed those charges which they have incurred for his benefit.”

The rule of liability stated in *Notara v. Henderson*⁷ has been recognised by the Scotch courts in *Adams v. Morris*⁸ where Lord President Inglis thus formulates the rule:⁹ “It is the duty of a master, when an injury has been caused to cargo by an excepted cause, to repair by all the means in his power the mischief which has been done, and to land the cargo in as good condition as the

¹ *Cp. Taff Vale Railway Company v. Giles*, 2 E. & B. 823, where it was held in the Ex. Ch. to be the duty of a railway company to plant “quicks” pending delivery.

² L. R. 5 P. C. 134.

³ L. R. 9 Ex. 132.

⁴ L. c. at 136.

⁵ 18 Rettie 153.

⁶ L. c. at 159.

⁷ L. c. at 165.

⁸ L. c. at 138.

⁹ L. R. 7 Q. B. 225.

Cargo
ex Argos.
Gaudet v.
Brown.

Great
Northern
Railway
Company v.
Swaffield.

Rule stated by
Lord President
Inglis in
Adams v.
Morris.

circumstances will admit. The neglect of this duty does not fall within the exceptions in the charter-party. It is the plain duty required of the master to the shipowners and the merchant and all concerned." Moreover, the authorities cited by Willes, J., in his judgment in *Notara v. Henderson*,¹ shew that this obligation is not founded merely on special local circumstances, but is so widely observed as to rise to the generality of a principle of universal law.

Duty of the carrier in the event of the refusal by the consignee to receive.
Hudson v. Baxendale.

In the event of the consignee absolutely refusing to receive goods, it was contended that there was an absolute duty on the carrier to give notice to the consignor. The Court of Exchequer, in *Hudson v. Baxendale*,² refused to go this length, and agreed with the direction of the judge at the trial, that "there [was] no law requiring a carrier to give notice, though in certain cases it might be reasonable that he should do so."³ Whether notice should be given or not is dependent on the facts of the case, not on any rule of law.

Proof of loss or non-delivery.

With regard to the proof of loss or non-delivery of goods, the principle is well stated in *Hutchinson on Carriers*;⁴ "Although the claim of the plaintiff in an action for the loss of the goods may rest upon negligence or nonfeasance, and not upon a positive misfeasance, and would therefore seem to require proof of a negative character, the burden of shewing the loss is unquestionably upon him, and he must give some proof of the allegation of the loss notwithstanding its negative character; and, if it be out of his power to shew positively the loss of the goods, he must at least shew such circumstances as would create the inference against the defendant that they had been lost, as, for instance, that they had been bailed to the carrier a sufficient length of time to be transported to their destination, and had not been there received or delivered to the person entitled to them to whom they were consigned."⁵

Vendee may sue carrier when property vests.

Where goods are ordered from a distant place, and the vendor sends them by a carrier, the vendee in whom the property vests, may bring the action, although he knows nothing of the carrier, and the carrier knows nothing of him.⁶

¹ L. R. 7 Q. B. 225, at 233, 234.

² 2 H. & N. 575.

³ L. c. at 582. As to American decisions, see *Merchants' Dispatch Company v. Moore*, 30 Am. R. 541, and note; *Gashweiler v. Wabash, &c. Railroad Company*, 53 Am. R. 558. As to effect of notice when given, see *Carr v. London and North-Western Railway Company*, L. R. 10 C. P. 307.

⁴ § 764.

⁵ *Woodbury v. Frink*, 14 Ill. 279, cited Angell, *Carriers* (5th ed.), § 470. See *McQuesten v. Sanford*, 40 Me. 117.

⁶ Per Crompton, J., delivering his opinion in *H. of L. in Bristol and Exeter Railway Company v. Collins*, 7 H. L. C. 194, at 211.

Where goods are delivered to a carrier to be carried to a certain place, with the name of the consignee stated, the consignee may demand them in another place, and the carrier is discharged from any liability to the vendor if he delivers them to the consignee so designated.¹

"It is clear," said Pollock, C.B., in *London and North-Western Railway Company v. Bartlett*,² "that a consignee may receive the goods at any stage of the journey; and though the consignor directs the carrier to deliver them at a particular place, there is no contract by the carrier to deliver them at that place and not elsewhere." Bramwell, B., adds, in his forceful way:³ "It would probably create a smile anywhere but in a court of law, if it were said that a carrier could not deliver to the consignee at any place except that specified by the consignor.⁴ The goods are intended to reach the consignee, and provided he receives them it is immaterial at what place they are delivered. The contract is to deliver the goods to the consignee at the place named by the consignor unless the consignee directs them to be delivered at a different place." This results from the implication, arising from the relation of the parties as consignor and consignee, that the ownership of the property is in the consignee. But where the consignor is known to the carrier to be the owner, the consignee is regarded simply as an agent to receive the goods at the place indicated.⁵ On the other hand, where the property is the consignee's, the consignor is no more than his agent in forwarding the goods consigned.⁶

¹ Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 45, sub-s. 2.

² 7 H. & N. 400, at 407, explained and distinguished in *Metcalfe v. Britannia Iron-works Company*, 1 Q. B. D. 613, per Quain, J., at 631: *affd.* 2 Q. B. D. 423.

³ *L. c.* at 408.

⁴ See *Cork Distilleries Company v. Great Southern and Western Railway Company (Ireland)*, L. R. 7 H. L. 269.

⁵ *Southern Express Company v. Dickson*, 94 U. S. (4 Otto) 549. In *Dawes v. Peck*, 8 T. R. 330, Lord Kenyon, C.J., gives the rule, at 33, indicating the proper party to sue for damage to goods consigned while in the custody of the carrier to be, that whoever has sustained the loss by the negligence of the carrier is the proper party to call for compensation from the person by whom he has been injured; and in the case before the Court the judgment was that the consignor of goods having delivered them to a particular carrier by order of the consignee, the consignor could not maintain an action against the carrier for their loss. This was distinguished in *Great Western Railway Company v. Bagge*, 15 Q. B. D. 625, by Lord Coleridge, C.J., at 627, where the consignor was held liable, on the terms of his contract, to pay the freight of goods carried by the plaintiffs. In *Davis v. James*, 5 Burr. 2680, it was objected that the action ought to have been brought in the name of the consignee of the goods and not in the name of the consignor; "for that the consignor parted with their property upon their delivering the goods to the carrier; and that no property remained in them after such delivery." Lord Mansfield said: "There was neither law nor conscience in the objection. The vesting of the property may differ according to the circumstances of cases."

⁶ In *Gordon v. Harper*, 7 T. R. 9, at 12, Grose, J., says: "Where goods are delivered to a carrier, the owner has still a right of possession as against a tortfeasor, and the carrier is no more than his servant." In *Moore v. Wilson*, 1 T. R. 659, it was held that the consignor of goods might sue the carrier for non-delivery, "for that, whatever might be the contract between the vendor and the vendee, the agreement for the car-

Demand of goods at a place other than that to which they are consigned.

London and North-Western Railway Company v. Bartlett.

Dictum of Bramwell, B.

Carrier's rights
under a floating
policy of
insurance.
London and
North Western
Railway Com-
pany v. Glyn.

There remains to be noticed the contention raised in *London and North-Western Railway Company v. Glyn*.¹ The plaintiffs, who were common carriers, insured against fire in a company of which the defendant was treasurer. By the policy £15,000 was declared to be insured "on goods their (plaintiffs') own and in trust as carriers" in a certain warehouse. There were various other phrases and conditions to the same effect. The warehouse, with its contents, was destroyed by fire, and the insurance company resisted payment of a greater sum than would cover the plaintiffs' interest as carriers. It was contended by the insurers that as the value of the goods destroyed by fire exceeded £10,000, and as the owners had not declared such value to the plaintiffs, the plaintiffs were not liable to the owners for the loss by reason of the Carriers Act, 1830.² But the Court negatived this, and held that the plaintiffs would be trustees for the owners of the goods of the amount thus recovered, less plaintiffs' charges as carriers, in respect of the goods.

Vendor's
rights where
purchaser
declines to
receive goods.

The question may arise as to the rights of the vendor, in the event of the purchaser declining to receive the goods as by the contract he ought,³ a question often occurring when goods are left in the carrier's hands, though only incidentally bearing on the consideration of the carrier's duty.

Greaves v.
Ashlin.

Holt, C.J., laid down⁴ that "if he [the vendor] does not come and pay and take the goods, the vendor ought to go and request him; and then, if he does not come and pay, and take away the goods in convenient time, the agreement is dissolved, and he is at liberty to sell them to any other person." The ruling of Lord Ellenborough, C.J., in *Greaves v. Ashlin*,⁵ has sometimes been thought to be in conflict with Holt, C.J.'s statement. "If," said Lord Ellenborough, "the buyer does not carry away the goods bought within a reasonable time, the seller may charge him warehouse-room; or he may bring an action for not removing them, should he be prejudiced by the delay. But the buyer's neglect does not entitle the seller to put an end to the contract. . . . In this case the notice given to fetch away the goods could not discharge the defendant from his contract, nor empower

riage was between the carrier and the vendor, the latter of whom was by law liable." *Thompson v. Fargo*, 49 N. Y. 188. For other cases see the note in 1 Rev. R. 347. See Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 32, sub-s. 2.

¹ 1 E. & E. 652, see *ante*, 993.

² 11 Geo. IV. & 1 Will. IV. c. 68, s. 1.

³ As to transfer of property as between seller and buyer, see Sale of Goods Act, 1893, 1893 (56 & 57 Vict. c. 71), part ii.

⁴ (1704) Langfort v. Administratrix of Tiler, 1 Salk. 112. See per Lord Ellenborough, C. J. *Hinde v. Whitehouse*, 7 East 558, at 571.

⁵ (1813) 3 Camp. 426. All the cases are treated, Benjamin on Sale (4th ed.), 792 *et seqq.*

him to sell the property of the plaintiff." The goods in question were oats.

The right to sell is, however, supported by the next case, *Maclean v. Dunn*.¹ It was admitted by both plaintiff and defendant that "perishable articles" might be resold. Best, C.J., in his judgment, after remarking the difficulty in determining what are "perishable articles," thus continues: "If articles are not perishable, price is, and may alter in a few days, or a few hours. In that respect there is no difference between one commodity and another. It is a practice, therefore, founded on good sense, to make a resale of a disputed article, and to hold the original contractor responsible for the difference. The practice itself affords some evidence of the law, and we ought not to oppose it, except on the authority of decided cases. Those which have been cited do not apply. Where a man, in an action for goods sold and delivered, insists on having from the vendee the price at which he contracted to dispose of his goods, he cannot, perhaps, consistently with such a demand, dispose of them to another; but if he sues for damages in consequence of the vendee's refusing to complete his contract, it is not necessary that he should retain dominion over the goods. . . . It is most convenient that, when a party refuses to take goods he has purchased, they should be resold, and that he should be liable to the loss, if any, upon the resale. The goods may become worse the longer they are kept; and, at all events, there is the risk of the price becoming lower." In the subsequent case of *Acebal v. Levy*,² in the same Court, over which Tindal, C.J., then presided, it was considered "there can be no doubt but that the plaintiff might, after reselling the goods, recover the same measure of damages in a special count framed upon the refusal to accept and pay for the goods bought."

Maclean v. Dunn.
Judgment of
Best, C.J.:

Acebal v. Levy.

On the other hand, there are cases³ which Mr. Benjamin⁴ treats in this connection, and which he considers "decide expressly that the vendor has no right to resell, for they determine that he is responsible for nominal damages where there is no difference in these values," *i.e.*, the difference between the contract price and the market value.

Mr. Benjamin's
view.

Here also should be noted the comment in Blackburn on Sale,⁵ on *Maclean v. Dunn*. "The *dictum* of the Court goes to the

Comment on
Maclean v. Dunn in
Blackburn on
Sale.

¹ (1828) 4 Bing. 722. See *Boorman v. Nash*, 9 B. & C. 145. The right in the civil law to re-sell where the goods are of a perishable nature, is treated fully by Moyle, *Contract of Sale*, 148. See *Sale of Goods Act*, 1893 (56 & 57 Vict. c. 71), s. 48.

² (1834) 10 Bing. 376, at 384. Cp. 56 & 57 Vict. c. 71, s. 47.

³ *Valpy v. Oakeley*, 16 Q. B. 941; *Griffiths v. Perry*, 1 E. & E. 680, considered and followed *Ex parte Chalmers*, *In re Edwards*, L. R. 8 Ch. 289.

⁴ On Sale (4th ed.), 797.

⁵ (2nd ed.) 469.

extent that the resale was perfectly legal and justifiable; probably it may be so, but there has never been a decision to that extent."

Cases
considered.

There is, however, a clear distinction between the various cases we have been considering. Holt, C.J., in *Langfort v. Tiler*,¹ asserts merely the validity of a sale after notice from the vendor to the purchaser to receive the goods and neglect to do so, after the lapse of "convenient time." *Maclean v. Dunn* was well within the requirements thus laid down, for after notice by the vendor the purchaser "declined to receive them,"² i.e., the goods. The vendor then sold.

On the other hand, in *Greaves v. Ashlin*,³ there was mere omission to "carry away the goods bought, within a reasonable time." In the cases cited by Mr. Benjamin again, the decision is that, though non-payment does not put an end to a contract, still the vendor is entitled to refuse delivery of goods sold till he is tendered payment for them;⁴ or in the words of Brett, J.,⁵ "when one contracting party gives notice to the other that he is insolvent, and does nothing more, the other party has a right to assume that he intends to abandon the contract." So that the damages recoverable from the vendor for breach of his contract in not delivering are nominal merely, even if the purchaser's inability to pay is manifested by matter subsequent to the period when it was the vendor's duty to have made delivery of the goods under the contract; and where, had he made the delivery to which he was in law bound, the property would have actually vested in the purchaser.⁶

Summary of
the law.

In these latter cases then—that is, in the cases where the purchaser has merely abstained from taking delivery, and in the cases where the vendor has refused delivery on account of the manifested inability of the purchaser to make payment—in the event of a resale by the vendor at a profit on tender of the purchase money, and expenses probably, the purchaser would be entitled to the profit.⁷ Till he pays or tenders the price he cannot

¹ 1 Salk. 112.

² 4 Bing., at 724.

³ 3 Camp. 426. As to "reasonable time," *ante*, 1010.

⁴ *Ex parte Chalmers, In re Edwards*, L. R. 8 Ch. 289.

⁵ *Morgan v. Bain*, L. R. 10 C. P. 15, at 26. *In re Phoenix, Bessemer Steel Company, Ex parte Carnforth Hematite Iron Company*, 4 Ch. Div. 108, explained *Mersey Steel and Iron Company v. Naylor*, 9 Q. B. Div. 648, per Jessel, M. R., at 658; and if the plaintiff brings an action without tender of the price or what is equivalent to it, he cannot maintain it: *Morton v. Lamb*, 7 T. R. 125. See also *Pordage v. Cole*, 1 Wms. Saund. 319 l, and *Cutter v. Powell*, 2 Sm. L. C. (9th ed.) 1.

⁶ In *Pease v. Gloaghec*, L. R. 1 P. C. 219, at 227, it is said, "but if bills given for the price are current, though certain to be dishonoured, the property has passed even to the divesting the vendor's right to stop *in transitu*."

⁷ Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 37; Benjamin, *On Sale* (4th ed.), 797.

maintain trover¹ or an action against a wrongdoer.² But neither failure to seek delivery nor non-payment of an instalment, nor even the calling a meeting of creditors and a declaration of insolvency by the purchaser will put an end to the contract.³ Where, then, the goods are properly sold and a loss results, the purchaser is liable up to the contract price *plus* the reasonable expenses attending the sale. If, however, the sale realizes a profit, the purchaser may claim this on tender of the price *plus* the reasonable expenses of the sale; for in selling the goods the vendor is considered to act as the agent of the purchaser for that purpose. The distinction as to whether the property has passed or not must be kept in mind in both classes of cases as materially affecting the character of the sale; and this distinction is dependent on whether the contract is executed or executory, for specific chattels or for goods, to which something has to be done.⁴ In the class, however, which includes *Langfort v. Administratrix of Tiler*⁵ and *Maclean v. Dunn*⁶ there is not merely an omission or default on the part of the purchaser, but in the latter case at least a positive refusal to perform the contract; and in the former such conduct apparently as warranted the inference of a refusal. If then the vendor elects to resell and to treat the defendant's refusal as a repudiation of the contract there seems nothing inconsistent with the class of cases we have just been considering in his doing so. In the event of a profit being realized the purchaser would not be entitled to it, because he had refused to perform his contract and the vendor had acted upon his refusal as he was entitled to do. His mere non-performance, as we have seen, is quite a different thing, and gives rise to rights quite different also. The vendor, however, has his option of treating the contract as subsisting and suing the purchaser for the price.⁷

If in either of the cases just considered the vendor pro-

Mode of conducting a re-sale by the vendor.

¹ *Milgate v. Kebble*, 3 M. & G. 100; *Bloxam v. Sanders*, 4 B. & C. 941. See Blackburn, *On Sale* (2nd ed.), 445, for a comment on this last case. Also per Blackburn, *J.*, *Donald v. Suckling*, L. R. 1 Q. B. 585, at 616, and *Grice v. Richardson*, 3 App. Cas. 319, per Sir Barnes Peacock, delivering the judgment of the Privy Council, at 322; 2 Kent, Comm. 493, note (d).

² *Lord v. Price*, L. R. 9 Ex. 54.

³ *Ex parte Chalmers, In re Edwards*, L. R. 8 Ch. 289.

⁴ *Simmons v. Swift*, 5 B. & C. 857, at 862; *Dixon v. Yates*, 5 B. & Ad. 313, at 340. *Martindale v. Smith*, 1 Q. B. 389, is the case of a special contract. See Hare, *Contracts, Sale of Specific Goods*, 396, 456, *Dependent and Independent Promises*, 587 615. Where an act is to be done by each party which the defendant's neglect prevents being done, plaintiff may in an action for money had and received, recover any payments he has made under the contract: *Giles v. Edwards*, 7 T. R. 181.

⁵ 1 Salk. 112.

⁶ 4 Bing. 722.

⁷ The cases, English and American, are well considered in *Bement v. Smith*, 15 Wend. (N. Y.) 493. See also 3 *Parsons, Contracts* (6th ed.), 209 *cum notis*. Cp. *Sands v. Taylor*, 5 Johns. (Sup. Ct. N. Y.) 395.

ceeds to a resale, we are next to consider his proper mode of procedure. There must first be, as we have seen,¹ an offer of the goods by the vendor and default by the purchaser. Notice of the intention to sell seems also requisite, or, at least, highly advisable, and an intimation that the vendor will hold the purchaser responsible for the difference between the agreed price and the sum realized, with all expenses necessarily incurred.² Cases, of course, may occur where these preliminaries would be dispensed with. In the run of cases their observance would most probably be insisted on. The *onus* at least would be on the vendor who disregarded them to shew that he had taken other suitable steps. Besides, as favourable a sale as can be obtained must be secured. *Quoad hoc*, the vendor is the agent of the vendee.³ There is no duty to notify to the purchaser the time and place of the sale, for the doing so might thwart the sale itself. The ordinary method of sale of the particular goods should be adopted, unless circumstances make some special method more advantageous. "The only requisite to such a sale, as a measure of the rights and the injury of the party, is good faith, including the proper observance of the usages of the particular trade."⁴ Neither need the sale be by public auction, though it follows from what has been said, that if sale by public auction is the customary mode of sale in the particular trade concerned that mode should preferentially be adopted.⁵

A delivery to any general carrier where there are no specific directions is a constructive delivery to the vendee. If there be no particular mode of carriage specified, and no particular course of dealing between the parties, the property, and the risk remain with the vendor while in the hands of the common carrier.⁶

Delivery to
carrier con-
structive
delivery to
vendee.

¹ Langfort v. Administratrix of Tiler, 1 Salk. 112.

² Sands v. Taylor, 5 Johns. (Sup. Ct. N. Y.) 395.

³ This rule holds good in the sale of real estate also; see Baldwin v. Belcher, 1 Jo. & Lat. (Ir. Ch.) 18, at 26; Daniels v. Davison, 16 Ves. 249, at 255.

⁴ Per Emott, J., Pollen v. Le Roy, 30 N. Y. 549, at 557.

⁵ *L. c.* at 558. The maxim *caveat emptor* is considered and explained in Drummond v. Van Ingen, 12 App. Cas. 284, approving Mody v. Gregson, L. R. 4 Ex. 49. See also Jones v. Just, L. R. 3 Q. B. 197, and Jones v. Padgett, 24 Q. B. D. 650. For the obligation of the vendor in the civil law to take due care of goods pending delivery, Moyle, Contract of Sale, 107; Just. Inst. 3, 23, 3, note. As to the passing of property in *res specifica*, Seath v. Moore, 11 App. Cas. 350, where the alteration in the law of Scotland effected by the Mercantile Law Amendment (Scotland) Act (19 & 20 Vict. c. 60), s. 1, is considered; Henckell du Buisson v. Swan, 17 Rettie 252. See also Mucklow v. Mangles, 1 Taunt. 318, with the criticism in Carruthers v. Payne, 5 Bing. 270. In the Common Pleas in Meyerstein v. Barber, L. R. 2 C. P. 38, at 51, Willes, J., points out that since Dixon v. Yates, 5 B. & Ad. 313, it has never been doubted that by the law of England the sale of a specific chattel passes the property to the vendee without delivery, notwithstanding the learned note of Serjeant Manning to Bailey v. Culverwell, 2 M. & Ry. 566. Lord Blackburn says the same in almost identical words in Kemp v. Falk, 7 App. Cas. 573, at 586.

⁶ Coates v. Chaplin, 2 G. & D. 552. As to where the vendor is excused, Vale v. Bayle, 1 Cowp. 294.

If the goods are forwarded by sea, the vendor should cause them to be insured, if there is an usage to insure.¹ In all cases the vendor should inform the vendee of the consignment and delivery with due diligence.²

¹ *Buckman v. Levi*, 3 Camp. 414. See now Sale of Goods Act 1893 (56 & 57 Vict. c. 71), s. 32, sub-s. 3.

² 2 Kent, Comm. 500. See the history and leading principles of Vendor's Right of Stoppage *in Transitu*, 2 Kent, Comm. (13th ed.), 540, *et seqq. cum notis*.

CHAPTER III.

COMMON CARRIERS BY LAND.

1. *Of Goods.*

WE have now gone through the leading general relations common to all classes of carriers. The next portion of our subject deals with those principles of the law of common carriers, which have a special bearing on land carriage. In tracing the history of the notices published by common carriers limiting their liability,¹ we gained some insight into the uncertainty produced by the interpretations, not always consistent, put upon them by the Courts, and into the hardships worked by the notification of unreasonable conditions of carriage by carriers who, from their position, were able to enforce their terms on perhaps unwilling, and certainly powerless customers.

The Carriers' Act, 1830.

In 1830 the evil had become so apparent and pressing that Parliament intervened, and, by the Carriers Act,² placed the law as it bore on the land carriage of goods on an uniform footing. This Act, by sec. 1, provides³ that no common carrier by land⁴ for hire shall be liable for the loss of,⁵ or any injury to, any gold or silver coin, gold or silver in a manufactured or unmanufactured state, precious stones, jewellery, watches, clocks, time-pieces, trinkets,⁶ bills, bank-notes, orders, notes or securities for

¹ *Ante*, 1078.

² 11 Geo. IV. & 1 Will. IV. c. 68.

³ Amended 28 & 29 Vict. c. 94.

⁴ The Act applies, though the carriage is partly by water, in so far as the contract is by land: *Baxendale v. Great Eastern Railway Company*, L. R. 4 Q. B. 244 (Ex. Ch.); *Le Conteur v. London and South-Western Railway Company*, L. R. 1 Q. B. 54; *Pianciaui v. London and South-Western Railway Company*, 18 C. B. 226.

⁵ As to the detention, *Hearn v. London and South-Western Railway Company*, 10 Ex. 793; as to the temporary loss, *Millen v. Brasch*, 8 Q. B. D. 35, 10 Q. B. Div. 142. As to taking beyond their destination, *Morritt v. North-Eastern Railway Company*, 1 Q. B. D. 302. Misdelivery is loss under sec. 7 of 17 & 18 Vict. c. 31, *Skipworth v. Great Western Railway Company*, 59 L. T. 520; *post*, 1124.

⁶ Ivory, black and agate bracelets, shirt pins, gilt rings, brooches, tortoise-shell purses, glass smelling-bottles, are trinkets: *Bernstein v. Baxendale*, 6 C. B. N. S. 251; so are ivory fans: *Attorney-General v. Harley*, 5 Russ. (Ch.) 173, 174; but not an eye-glass with a gold chain attached to it for the purpose of being worn round the neck, *Davey v. Mason*, Car. & M. 45.

payment of money,¹ stamps, maps, writings, title deeds, paintings,² engravings,³ pictures,⁴ gold or silver plate or plated articles, glass,⁵ china, silks manufactured or unmanufactured, wrought up or not wrought up with other materials,⁶ furs,⁷ or lace, contained in any parcels⁸ or package⁹ when the value exceeds the sum of £10, unless at the time of delivery at the office, warehouse, or receiving-house¹⁰ of such carrier, or to his bookkeeper, coachman, or other servant, the value and nature of such article or articles shall have been declared,¹¹ and the increased charge, or an engagement to pay the same, accepted by the person receiving the parcel.

By section 2 a common carrier, on the delivery of such parcels Section 2. or packages exceeding the value of £10 and so declared as aforesaid, may demand an increased rate of charge, to be announced by a notice in legible characters affixed in the office, warehouse, or other receiving house,¹² and persons sending parcels are to be bound by such notice without further proof of the same having come to their knowledge.

¹ A document in the form of a bill of exchange, accepted, but with no drawee, and found by the jury to be of no value, is not within these words: *Stoessiger v. South-Eastern Railway Company*, 3 E. & B. 549.

² *Woodward v. London and North-Western Railway Company*, 3 Ex. D. 121, where it is held that coloured imitations of rugs and carpets and coloured working designs are not paintings within the Act.

³ *Boys v. Pink*, 8 C. & P. 361.

⁴ *Henderson v. London and North-Western Railway Company*, L. R. 5 Ex. 90.

⁵ *Owen v. Burnett*, 2 Cr. & M. 352. The same case decides that "articles of great value in a small compass" spoken of in the preamble does not limit the enactment to articles of small size.

⁶ *Davey v. Mason, Car. & M.* 45; *Flowers v. South-Eastern Railway Company*, 16 L. T. (N. S.) 329. See *Bernstein v. Baxendale*, 6 C. B. N. S. 251; *Brunt v. Midland Railway Company*, 2 H. & C. 889.

⁷ *Mayhew v. Nelson*, 6 C. & P. 58: "Hat bodies" made partly of the soft substance taken from the skin of rabbits and partly from the wool of sheep do not come within the description of "furs."

⁸ *Treadwin v. Great Eastern Railway Company*, L. R. 3 C. P. 308. See *Carriers Amendment Act, 1865* (28 & 29 Vict. c. 94). In *Henderson v. London and North-Western Railway Company*, L. R. 5 Ex. 90, distinguishing *Treadwin v. Great Eastern Railway Company*, it was held that where framed pictures are sent by a carrier the frames as well as the pictures are within the *Carriers Act*.

⁹ A waggon containing articles of the kind mentioned in the section, but open at the top so that the company can see what the articles are, is a parcel or package: *Whaite v. Lancashire and Yorkshire Railway Company*, L. R. 9 Ex. 67.

¹⁰ *Syms v. Chaplin*, 5 A. & E. 634.

¹¹ If the value and nature of the articles is declared, the common law liability revives whether the carrier demands an increased charge or not: *Behrens v. Great Northern Railway Company*, 6 H. & N. 366, 7 H. & N. 950. It is a question of fact for the jury whether the goods in question are within the meaning of the section: *Brunt v. Midland Railway Company*, 2 H. & C. 889; *Woodward v. London and North-Western Railway Company*, 3 Ex. D. 121. The value is the price the consignee is to pay, not the price at which the consignor bought: *Blankensee v. London and North-Western Railway Company*, 45 L. T. 761.

¹² For form of notice, see *Owen v. Burnett*, 2 Cr. & M. 353. A formal notice of the nature of the goods is not necessary if the value is, in fact, brought to the knowledge of the company, so that they may fix the additional charge if so minded: *Bradbury v. Sutton*, 19 W. R. 800, and in *Ex. Ch. 21 W. R. 128*. The notice should be in such large characters that a person delivering goods at the office could not fail to read it without gross negligence: *Clayton v. Hunt*, 3 Camp. 27; *Butler v. Heane*, 2 Camp. 415.

- Section 3. By section 3, when the value of a parcel has been declared under the Act and the increased rate of charge has been paid or contracted to be paid, the carrier shall, if required, give a receipt for the parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty, and carriers who do not give such receipt when required, or affix the proper notice, are not entitled to the benefit of this Act, but shall be responsible as at common law and liable to refund the increased charge.
- Section 4. By section 4 a common carrier cannot by a notice¹ limit his liability at common law to answer for the loss of any articles in respect whereof he is not entitled to the benefit of this Act.
- Section 5. By section 5 every office of such common carrier shall be deemed a receiving house;² any one proprietor shall be liable to be sued, and no action shall abate for the want of joining any co-proprietor.
- Section 6. By section 6 special contracts are excepted from the operation of the Act.³
- Section 7. By section 7 persons entitled to damages for parcels lost or damaged may recover the extra charge for insurance.
- Section 8. By section 8 a common carrier shall not be protected by this Act from liability to answer for losses arising from the felonious acts of servants in his employ; nor shall the servant himself be freed thereby from answering for his own personal neglect or misconduct.⁴

¹ This means a public notice, see *Walker v. York and North Midland Railway Company*, 2 E. & B. 750, where Lord Campbell, C.J., says, at 759: "It seems to be contended that, since the statute 11 Geo. IV. & 1 Will. IV. c. 68, it is not lawful to make a special contract limiting the liability of a carrier; but I am clearly of opinion that the Legislature had no such intention, and that such is not the operation of the Act. Sec. 4 in effect says that a carrier shall not limit his liability merely by a public notice, but leaves it open to him to limit his liability by a special contract." See per Wightman, J., at 762.

² *Burrell v. North*, 2 C. & K. 680; *Davey v. Mason*, Car. & M. 45; *Williams v. Gesse*, 3 Bing. N. C. 849, s.c. *sub nom. Williams v. Gessey*, 7 C. & P. 777, 5 Scott 56; *Boys v. Pink*, 8 C. & P. 361.

³ *Shaw v. Great Western Railway Company* (1894), 1 Q. B. 373. The section does not give validity to special contracts generally, but refers only to contracts by which the company voluntarily renounces the protection given by s. 1 of the Act; *Barendale v. Great Eastern Railway Company*, L. R. 4 Q. B. 244.

⁴ In *Machu v. London and South-Western Railway Company*, 2 Ex. 415, "Servant" is not confined to a servant in the strict sense of the word, but includes a person employed, not directly, but through his employer's employment. See also *Bank of Kentucky v. Adams Express Company*, 93 U. S. (3 Otto) 174. In *Syms v. Chaplin*, 5 A. & E. 634, it was laid down that where goods are received by the agent of two companies, without indication as to which he receives them for, they are not received for either until the agent makes up his mind, but from that time they are held for that he determines: *Stephens v. London and South-Western Railway Company*, 18 Q. B. Div. 121; see *Stroud, Judicial Dictionary sub voce Servant*. Where a felony is set up as an answer to a defence under this Act, the question of negligence is immaterial: *Great Western Railway Company v. Rimell*, 18 C. B. 575; *Metcalf v. London and Brighton Railway Company*, 4 C. B. N. S. 307. It is enough for the plaintiff to make out a *prima facie* case of felony; if this is left unanswered, plaintiff is entitled to succeed: *Vaughton v. London and North-Western Railway Company*, L. R. 9 Ex. 93; *M'Queen v. Great Western Railway Company*, L. R. 10 Q. B. 569. But mere showing that goods have

By section 9 the declared value of a parcel is not conclusive against the carrier.

By section 10 money can be paid into court with the same effect as money paid into court in any other action.

In the Exchequer Chamber in *Baxendale v. Hart, Patteson, J.*,¹ thus sums up the effect of the Act: "The meaning of the Legislature is, that all persons sending goods of a particular description and value, whenever they deliver them to the carrier are bound to give information of the nature and value of the articles. That is the first clause; and the object of the Legislature was, that such information should be given, whether the goods were delivered at the office of the carrier, or at the sender's house, or on the road, or elsewhere; and clauses follow with certain provisions as to what is *then* to be done. Although the value and nature of the articles may be declared, it does not necessarily follow that the carrier would be protected, but a different clause must be acted on before his liability ceases. However, the first step to be taken is that the sender of the goods notify their value; then it is that the carrier is entitled to have a larger charge. He cannot have

Patteson, J.'s summary of the effect of the Act in Baxendale v. Hart.

been delivered to the company, and lost, or a portion abstracted, is not sufficient to raise the inference of a felony by the company's servants, or as Willes, J., states the point, When it is sought to establish a theory by circumstantial evidence, all the facts proved must be consistent with the theory; but there must also be some one substantial credible fact inconsistent with the contrary: *Great Western Railway Company v. Rimell*, 27 L. J. C. P. 201, at 205; *Metcalf v. London and Brighton Railway Company*, 27 L. J. C. P. 333, at 334. See *Vaughton v. London and North-Western Railway Company*, L. R. 9 Ex. 93, at 97. As to the *dictum* of Willes, J., in 4 C. B. N. S., at 309, 310, see note to *Coggs v. Bernard*, 1 Sm. L. C. (9th ed.), at 246; *Gogarty v. Great Southern and Western Railway Company*, Ir. R. 9 C. L. 233. In *Roche v. Cork, Blackrock, and Passage Railway Company*, 24 L. R. Ir. 250, the Act does not seem to have been adopted; and on a loss being shewn the company did not call the night-watchman who had charge of the room where the plaintiff's bag was deposited. The defendants were accordingly held liable. See *Turner v. Great Western Railway Company*, 34 L. T. (N. S.) 22. As to evidence admissible, see *Kirkstall Brewery Company v. Furness Railway Company*, L. R. 9 Q. B. 468. *Butt v. Great Western Railway Company*, 11 C. B. 140, was not within the statute. See as to this per Jervia, C.J., *Great Western Railway Company v. Rimell*, 18 C. B. 575, at 585; also per Willes, J., at 586. Cp. *McQuesten v. Sanford*, 40 Me. 117. Loss by theft by strangers or by the carrier's servants, in the absence of gross negligence, was held a risk of the road against which the contract or notice at common law protected the carrier entirely apart from the Act of 1830, and notwithstanding s. 8 of that Act, in *Shaw v. Great Western Railway Company* (1894), 1 Q. B. 373. See also *Great Western Railway Company v. Willis*, 18 C. B. N. S. 748, as to admissions by railway servants. The admissions of a coachman as to the loss of a parcel were received against the coach proprietor in *Mayhew v. Nelson*, 6 C. & P. 58. As to the personal liability, *ex delicto*, of the coachman, guard, or other servant, *Cavanagh v. Such*, 1 Price (Ex.) 331; *Williams v. Cranston*, 2 Stark. (N. P.) 82.

¹ 6 Ex. 769, at 789. The carrier loses the benefit of the Act if, after a declaration of value, he receives the goods without demanding the extra charge: *Behrens v. Great Northern Railway Company*, 6 H. & N. 366, 7 H. & N. 950. He has an insurable interest in goods the value of which has not been declared in accordance with the Act: *London and North-Western Railway Company v. Glyn*, 28 L. J. Q. B. 188. Every person actually engaged in the performance of the contract of carriage and delivery is a servant of the carrier within the 5th section, though not strictly so within the meaning of *Quarman v. Burnett*, 6 M. & W. 499; *Machu v. South-Western Railway Company*, 2 Ex. 415.

that larger charge, or save himself from responsibility, by saying, 'I will have such a sum of money,' but he must have a tariff stuck up in his office, to notify to all persons sending articles of that kind what he proposes to demand beyond the usual charge. The notice required by sect. 2 to be affixed in the office, is not a notice that the carrier means to avail himself of the benefit of the Act, and that all persons who send articles of a particular description and value shall tell him that they are of that description and value—for the statute requires that in the first instance—but it is only a notice of what the extra charge is to be."

Special contract allowable under the Act.

From the date of the coming into force of the Act a mere general notice ceased to operate as a public condition or public declaration; and, in order to have any effect a notice now had to amount to a special contract.

Before the Act, where the common carrier published a notice addressed to the public at large, the question raised was whether the notice was brought home to the person sought to be affected by it. A notice might also be specifically delivered to some person to form the basis of a special contract with him. Where the common carrier did not profess to be a common carrier of the goods tendered him for conveyance, this was always, and continues to be, allowable; and if the consignor, after seeing the notice sent the goods, he was taken to agree that they should be sent on the carrier's terms.

Rights of the Carrier under the Act as to payment.

Since the Act, where the goods are within the common carrier's profession, and their nature and value is declared (though there is a general notice displayed respecting goods above £10 in value), unless the increased charge in respect of them is specially notified to the proprietor of goods, the carrier cannot demand the extra payment. If he notifies it but fails to demand it, he is in the same way to be taken to receive the goods subject to his common law liability.¹ Moreover, it is competent for the carrier to insist on the full price of carriage being paid beforehand, and unless payment is made he may decline to carry or only carry on his own terms. If payment is made as demanded, the carrier is bound to carry on the terms of the common law liability as modified by the Carriers Act, 1830. If the price is not paid and the common law liability as modified by the Act is not insisted on, and the proprietor of the goods still chooses that they should be carried, the carrier may insist on his own terms. "Probably the effect of such a contract would be only to exclude certain losses, leaving the carrier liable, *as upon the custom of England*, for the remainder."²

¹ Behrens v. Great Northern Railway Company, 7 H. & N. 950.

² Wyld v. Pickford, 8 M. & W. 443, per Parke, B., at 458.

There has been considerable conflict of authority respecting the conditions that may be imposed by a special agreement. By the common law, common carriers are bound to carry for all persons who apply, and for a reasonable reward, unless they have a reasonable excuse for refusing to do so.¹ The interpretation of a special contract *prima facie* is that, the consignor, having the right to insist on the performance by the carrier of his common law duty, has elected to waive it and to agree to a contract more to the mind of the parties.

Conditions allowable under a special contract.

This nominal freedom of choice became ever more and more illusory as the business of a common carrier was concentrated in a limited number of powerful corporations, who were able absolutely to dictate the acceptance of what terms they pleased, on pain of practically prohibiting carriage on any other terms. Certain limitations there were beyond which common carriers were not permitted to go. Story, J., writing in 1832, thus states the limit at that date:² "It is to be understood, that common carriers cannot by any special agreement exempt themselves from all responsibility so as to evade altogether the salutary policy of the common law. They cannot, therefore, by a special notice exempt themselves from all responsibility in cases of gross negligence or fraud; or, by demanding an exorbitant price, compel the owner of the goods to yield to unjust and oppressive limitations and qualifications of his rights. The carrier will also be equally as liable in case of the fraud or misconduct of his servants, as he would be in case of his own personal fraud or misconduct." Yet though this was the law in 1832, between that time and 1854 a contrary rule gradually came to be established; and at the time of the passing of the Railway and Canal Traffic Act, 1854, the decisions, according to Blackburn, J., had come to hold that a carrier might by a special contract limit his responsibility, even in the case of gross negligence, misconduct, or fraud on the part of his servant.³

Limitations to the right of making special contracts as stated by Story, J., in 1832.

Blackburn, J.'s view of the change in the law between 1832 and 1854.

This change is to be traced through a series of cases, the first of which is *Wyld v. Pickford*.⁴ The first count of the declaration in that case charged the defendants with a breach of duty as carriers in not taking proper care of maps. The second count was in trover. To the first count there was a plea setting out that the plaintiffs had notice that the defendants would not be responsible

Wyld v. Pickford.

¹ *Benett v. Peninsular and Oriental Steamboat Company*, 6 C. B. 775. Story, Bailm. §§ 495, 591. "No doubt, at common law, a carrier may enter into a special contract. He may, it is true, be bound to carry goods; and, if he refuses to do so, except on the terms of a special contract, he may subject himself to an action for that breach of duty": per Martin, B., *Carr v. Lancashire and Yorkshire Railway Company*, 7 Ex. 707, at 715. *Ante*, 1056.

² Bailm. § 549.

³ Per Blackburn, J., *Peck v. North Staffordshire Railway Company*, 10 H. L. C. 473, at 494.

⁴ (1841) 8 M. & W. 443.

for loss and damage to maps unless insured and paid for at the time of the delivery to the defendants, and that the defendants accepted on this condition. There was a similar plea to the second count, setting out that the conversion was a mis-delivery through mistake and inadvertency. To these pleas there was a demurrer. The Court held that a condition or declaration operates only by being incorporated in a special contract. Judgment was given for the plaintiff, because on the balance of the authorities a notice that the carrier "would not be responsible for the loss of or damage done to"¹ goods unless insured did not make the carrier irresponsible for every loss, but only for such as occurred without negligence, whether gross or ordinary, and because the inadvertent mis-delivery admitted in the plea might be grossly negligent, even though inadvertent. This decision went on the view that the authorities bound the Court to construe the terms of the notice, that the carrier "would not be responsible for the loss or damage to" goods, to mean would not be responsible for loss or damage unless caused by negligence.

Hinton v.
Dibbin.

The matter was next considered in *Hinton v. Dibbin*,² where the action was for the negligent loss of silk of a greater value than £10. The plea was the Carriers Act. Gross negligence was averred by way of replication; to this there was a demurrer. This raised the precise point whether, under the Carriers Act, the carrier was exempted from negligence as well as mischance. The Court held that he was.³

Shaw v.
York and
North Midland
Railway
Company.

Then came a series of railway cases. The first of these is *Shaw v. York and North Midland Railway Company*.⁴ Plaintiff claimed for the loss of a horse against the defendants as carriers. When the horse was received by the defendants, a ticket was given to the plaintiff with the following notice on it: "N.B.—This ticket is issued subject to the owner's undertaking all risks of conveyance whatsoever, as the Company will not be responsible for any injury or damage (howsoever caused) occurring to horses or carriages, while travelling, or in loading or unloading." The injury to the horse was caused by a defect in the horse-box, pointed out to the defendants' servants, who had ineffectually tried to put it right. Alderson, B., at the trial, was of opinion, first, that the defendants were bound to the exercise of ordinary care, the notice notwithstanding; secondly, that, on the authority of *Lyon v. Mells*,⁵ the notice was subject to

¹ 8 M. & W. at 444.

² (1842) 2 Q. B. 646.

³ See a case with similar facts but with different statutory words, where the carrier though exonerated *quod* common carrier, was held liable as an ordinary bailee, *Wheeler v. Oceanic Steam Navigation Company*, 125 N. Y. 155, 21 Am. St. R. 729.

⁴ (1849) 13 Q. B. 347.

⁵ 5 East 428. See, too, *Garnett v. Willan*, 5 B. & Ald. 53, holding that the con-

an implied exception of injury arising from the defective horse-box. He accordingly directed a verdict for the plaintiff. A new trial was granted on the ground of misdirection, Lord Denman, C.J., holding¹ that the terms of the ticket must be adhered to as expressing the contract; and though the plaintiff "might have alleged that it was the duty of the defendants to have furnished proper and sufficient carriages, and that the loss happened from a breach of that duty," he had not done so, but had alleged instead a duty arising from a contract the existence of which was disproved by the evidence.

Austin *v.* Manchester, Sheffield, and Lincolnshire Railway Company² followed—also the case of the conveyance of a horse. Like the former, this was decided on the form of the declaration; though the effect of the decision was that where the plaintiff by signed conditions took upon himself all risks of conveyance, the carriers were not liable even for gross negligence.

Austin *v.*
Manchester,
Sheffield, and
Lincolnshire
Railway
Company.

Then came Chippendale *v.* Lancashire and Yorkshire Railway Company,³ an appeal from a county court, which held the defendants exonerated from liability, on the terms of the condition on their ticket, for any injury, even though caused by a defect in the carriage in which the plaintiff's cattle were conveyed. Erle, J., said:⁴ "I take it that the carriage was fit for the journey and fit for the weight, and that the damage has entirely arisen from the freight being living animals, who made an effort to escape and injured themselves. That seems to me to be a risk for which the company peculiarly said that they would not be responsible. I think that a limitation, however wide in its terms, being in respect of live stock, is reasonable; for though domestic animals might be carried safely, it might be almost impossible to carry wild ones without injury."⁵

Chippendale
v. Lancashire
and Yorkshire
Railway
Company.

Austin *v.* Manchester, Sheffield, and Lincolnshire Railway Company⁶ in the Common Pleas is the next case. The declaration, which "appears to have been drawn with great care in order to avoid the objection upon which the decisions in *Shaw v. The York and North Midland Railway Company*⁷ and this case⁸ proceeded, and to lead to the supposition that there was some duty cast upon the defendants beyond that which arose out of the special contract made between them and the plaintiffs,"⁹ alleged "gross and cul-

Austin *v.*
Manchester,
Sheffield, and
Lincolnshire
Railway
Company.

¹ 13 Q. B. at 353.

² (1851) 16 Q. B. 600.

³ (1851) 21 L. J. Q. B. 22.

⁴ *L. c.* at 24.

⁵ *ante*, 1066. As to conditions on ticket, *post*, 1169.

⁶ (1852) 10 C. B. 454. This case is inserted out of its order in Common Bench Reports under 1850. The correct date of the decision is 8th May, 1852, as appears from 16 Jur. 763.

⁷ 13 Q. B. 347.

⁸ 20 L. J. Q. B. 440.

⁹ Per Cresswell, J., 10 C. B. at 472.

pable negligence" in the defendants' servants; which was proved at the trial. The condition on the ticket, said Cresswell, J., which exempted the defendants from responsibility of whatsoever kind and howsoever caused, protected them from responsibility for the negligence of the defendants' servants; "whether that is called negligence merely, or gross negligence, or culpable negligence, or whatever epithet might be applied to it, it was within the exemption from responsibility provided by the contract."¹

*Carr v.
Lancashire
and Yorkshire
Railway
Company.*

Very shortly afterwards *Carr v. Lancashire and Yorkshire Railway Company*² was decided in the Exchequer. The declaration stated that the defendants had received a horse to be carried for hire in a horse-box on their railway, subject to the conditions in a notice at the foot of a ticket for the conveyance of a horse, in these words: "This ticket is issued subject to the owner's undertaking all risks of conveyance whatsoever, as the company will not be responsible for any injury or damage (howsoever caused) occurring to live stock of any description travelling upon the Lancashire and Yorkshire Railway, or in their vehicles." The declaration then alleged that whilst the horse was in the custody of the defendants, and through the improper conduct and gross negligence and from want of proper care on the part of the defendants, the horse-box was propelled on the railway against certain trucks, and the horse thereby killed. The jury found that the accident was due to the gross negligence of the defendants. This finding was not complained of, yet judgment was arrested, on the ground that there was a special contract by which the plaintiff had taken on himself all risk, and agreed that the company should not be responsible for any injury or damage, however caused. Parke, B., observed,³ with reference to the argument on the inconvenience arising from such contracts, that that is not matter for the interference of the Court, but "it must be left to the Legislature, who may, if they please, put a stop to this mode which the carriers have adopted of limiting their liability."

*Railway and
Canal Traffic
Act, 1854.*

The Legislature apparently answered that appeal by passing the "Railway and Canal Traffic Act, 1854."⁴

*Walker v.
York and
North Midland
Railway
Company.*

Before it passed, however, occurred the case of *Walker v. York and North Midland Railway Company*.⁵ The defendants caused notices to be personally served on a number of fishermen at Scarborough Station that they would not carry fish except

¹ The judgment may be referred to for a discussion of the term gross negligence. See *ante*, 46, and 914.

² (1852) 7 Ex. 707; cp. *Gannell v. Ford*, 5 L. T. (N. S.) 604; *Great Northern Railway Company v. Morville*, 21 L. J. Q. B. 319.

³ 7 Ex. at 714.

⁴ 17 & 18 Vict. c. 31.

⁵ (1853) 2 E. & B. 750.

on certain conditions limiting liability, which conditions the servants of the company had no power to modify or effect. A riot ensued amongst the fishermen in consequence, and after this the plaintiff sent his goods. The judge directed the jury that, if they thought that the plaintiff was one of those served with the notice, they might infer from that fact a special contract according to its terms; and he advised them to draw that inference from the receipt of the notice and the subsequent sending of the goods, unless in the meanwhile the plaintiff had unambiguously refused to deliver the goods for carriage on the terms of the notice, and the defendants had acquiesced in the refusal. The jury having found that there was a special contract, the Court of Queen's Bench held that the direction had been right, and the verdict was not disturbed.¹

The year following this decision the Railway and Canal Traffic Act, 1854,² was passed. Contrasting this with the Carriers Act, 1830, Blackburn, J., says: "There is a considerable difference in the purview of the two Acts. Carriers were under the risks of the common law liability, and the first Act was passed for their protection. The monopoly which railway companies had was the ground of the extension of their liability by the second Act."³

Railway and Canal Traffic Act, 1854, contrasted with the Carriers Act, 1830.

In making an analysis of the Act we find section 1 deals with definitions.

Analysis of the Railway and Canal Traffic Act, 1854-Section 1.

By sects. 2 to 6⁴ a scheme is provided whereby persons to

¹ See, too, *York, Newcastle, and Berwick Railway Company v. Crisp*, 14 C. B. 527; *Hughes v. Great Western Railway Company*, 14 C. B. 637; *Slim v. Great Northern Railway Company*, 14 C. B. 647.

² 17 & 18 Vict. c. 31.

³ *Harrison v. London and Brighton Railway Company*, 2 B. & S. 122, at 134. See per Wright, J., *Shaw v. Great Western Railway Company* (1894), 1 Q. B. 373, at 382.

⁴ By the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 6, the jurisdiction is transferred to the Railway Commissioners (which is extended and amended by The Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25)). Since the passing of this Act, railway companies cannot refuse to carry traffic which they have facilities for carrying; but they carry it not as common carriers, but as ordinary bailees, and subject to reasonable conditions under section 7: *Dickson v. Great Northern Railway Company*, 18 Q. B. Div. 176, where the company refused to carry dogs except on the most onerous terms. (There is a metrical version of this case by Sir Frederick Pollock, *Leading Cases done into English*, 52.) "I cannot doubt," said Wills, J., in *Winsford Local Board v. Cheshire Lines Committee*, 24 Q. B. D. 456, at 459, referring to the last cited case, "that the Court of Appeal in that case meant to lay down the broad proposition which I propose to apply in this case. The view which, as I understand, was there taken of the position of a railway company before and after the Act, was that before the Act a railway company not being a common carrier of dogs was not bound to carry those animals at all, and therefore, if it did carry them could do so upon any terms it chose to lay down; but that since the passing of the Act a railway company, at all events if it undertook the carriage of these animals, came under the 2nd section, and could only do this subject to the obligation to afford 'reasonable facilities' for this kind of traffic over the whole extent of its system." See, too, in the same case, the comments on *South-Eastern Railway Company v. Railway Commissioners and the Corporation of Hastings*, 5 Q. B. D. 217, 6 Q. B. Div. 586. But see the view of the Court of Appeal in *Derlston Local Board v. London and North-Western Railway Company* (1894), 2 Q. B. 694, in which the correctness of the *Hastings* case is asserted. A company

Sections 2 to 6.

whom sufficient facilities are not afforded, or against whom any undue preference for a competitor is shewn, may obtain relief.

Section 7.

Sect. 7 provides that every railway and canal company "shall be liable for the loss of,¹ or for any injury² done to any horses, cattle, or other animals,³ or to any articles, goods⁴ or things in the receiving,⁵ forwarding, or delivering thereof, occasioned by the neglect or default⁶ of such company or its servants,⁷ notwithstanding any notice, condition, or declaration made and given by such company contrary thereto or in any wise limiting such lia-

will not be compelled to carry goods easily damaged to a particular station if there is no means of providing proper accommodation there: *Thomas v. North Staffordshire Railway Company*, 3 Rail. Cas. (N. & Macn.) 1. If a company refuse to carry a certain class of goods as common carriers, and require special rates to be paid for the carriage of such goods, this is a refusal of reasonable facilities: *Great Western Railway Company v. Railway Commissioners*, 7 Q. B. D. 182, at 194; see *Nicholls v. North-Eastern Railway Company*, 59 L. T. 137. As to undue preference, see *Denaby Main Colliery Company v. Manchester, Sheffield, and Lincolnshire Railway Company*, 11 App. Cas. 97; *Everashed v. London and North-Western Railway Company*, 3 App. Cas. 1029. There is no right of action by a common carrier against a company on the ground that he is excluded from their station; his remedy is by this Act: *Barker v. Midland Railway Company*, 18 C. B. 46. The *Rhymney Railway Company v. The Rhymney Iron Company, Limited*, 25 Q. B. Div. 146, following *Manchester, Sheffield, and Lincolnshire Railway Company v. Denaby Main Colliery Company*, 14 Q. B. D. 209, held that no action will be for breach of sec. 2 of *The Railway and Canal Traffic Act, 1854* (17 & 18 Vict. c. 31); see also per Lord Blackburn, 11 App. Cas. at 117. As to competing omnibuses, *In re Marriott and London and South-Western Railway Company*, 1 C. B. N. S. 499; *In re Palmer and London, Brighton, &c. Railway Company*, L. R. 6 C. P. 194; *In re Parkinson and Great Western Railway Company*, L. R. 6 C. P. 554.

¹ "Loss" under this sec. was held to cover misdelivery: *Skipwith v. Great Western Railway Company*, 59 L. T. 520.

² *Allday v. Great Western Railway Company*, 5 B. & S. 903.

³ *Harrison v. London and Brighton Railway Company*, 2 B. & S. 122, at 149; dogs are not such a description of animal as at common law a carrier could be compelled to carry: per *Wightman, J.*, at 144; cp. *Dickson v. Great Northern Railway Company*, 18 Q. B. Div. 176.

⁴ Passengers' luggage is within the section: *Cutler v. North London Railway Company*, 19 Q. B. D. 64; *Cohen v. South-Eastern Railway Company*, 2 Ex. D. 253.

⁵ This does not apply to goods received as warehouseman: *Van Toll v. South-Eastern Railway Company*, 31 L. J. C. P. 241; *Hodgman v. West Midland Railway Company*, 5 B. & S. 173; in *Ex. Ch.* 35 L. J. Q. B. 85; (as to remarks in dissenting opinion of *Cockburn, C.J.*, in the *Queen's Bench*, see *Hart v. Baxendale*, 6 Ex. 769); nor to carriage beyond the company's line: *Zunz v. South-Eastern Railway Company*, L. R. 4 Q. B. 539. *Roche v. Cork, Blackrock, and Passage Railway Company*, 24 L. R. Ir. 250, is the case of money extracted from a bag left in a cloak room.

⁶ In *Harrison v. London and Brighton Railway Company*, 2 B. & S. 122, *Ex. Ch.* 152, *Erle, C.J.*, and *Keating, J.*, held that if the loss was occasioned by pure accident, it was not within the statute; but the majority of the Court gave no opinion on the point.

⁷ "Servants" includes agents: *Doolan v. Midland Railway Company*, 2 App. Cas. 792. "Having regard to the terms of *The Railway and Canal Traffic Act*, and to the history of the law, and the occasion for the Act, it seems most reasonable to hold that it extends only to negligence or default in the nature of negligence, or within the scope of the servant's employment. The Company, therefore, as regards theft without negligence are left in the same position in which they had been at common law for at least a hundred years in relation to such theft, and that is, that subject to the case of the valuables specified in the Act of 1830, to the provisions of s. 8 of that Act, they can by contract or notice 'brought home' exempt themselves from liability for such theft": per *Wright, J.*, *Shaw v. Great Western Railway Company* (1894), 1 Q. B. 373, at 383.

bility; every such notice, condition, or declaration being hereby declared to be null and void."

But it is provided that, (1) the company may make such conditions as "shall be adjudged by the Court or judge, before whom any question relating thereto shall be heard, to be just and reasonable."¹

Company may make conditions.

(2) The amount of damage that may be recovered shall be limited to a sum not exceeding £50 for any horse, £15 per head for neat cattle, £2 per head for any sheep or pig,² unless a higher value shall have been declared at the time of delivery,³ in which case the company may demand an additional sum by way of insurance, and "such percentage or increased rate of charge shall be notified in the manner prescribed in the statute 11 Geo. IV. & 1 Will. IV. c. 68, and shall be binding upon such company in the manner therein mentioned

Limitation of the amount of damage recoverable in certain cases.

(3) The burden of proof of the value of animals, articles, goods, and things, and the amount of injury done thereto, shall in all cases under the Act lie upon those claiming compensation for loss or injury.⁴

Burden of proof.

¹ The carrier must shew that the contract is reasonable: *Ruddy v. Midland Great Western Railway Company*, 8 L. R. Ir. 224. If the higher charge is not in terms authorized by statute, it lies upon the carrier to shew that it is reasonable: *Harrison v. London and Brighton Railway Company*, 2 B. & S. 122, 152; see *Ashendon v. London, Brighton, and South Coast Railway Company*, 5 Ex. D. 190.

² A condition exonerating the carrier from liability for negligence in carrying cattle is invalid, even though there be a subsequent condition offering a free pass to induce the owner to send a drover in charge, and the free pass is accepted: *Rooth v. North-Eastern Railway Company*, L. R. 2 Ex. 173, but a condition to carry at a lower rate than the ordinary, with a liability for negligence only, was held not an unreasonable condition in *Harris v. Midland Railway Company*, 25 W. R. 63. A condition requiring damage to be pointed out at the time of unloading is unreasonable where there is no option: *Lloyd v. Waterford and Limerick Railway Company*, 15 Ir. C. L. R. 37; but one requiring aims for loss to be sent in within seven days of delivery has been held good: *Lewis v. Great Western Railway Company*, 5 H. & N. 867. See also *Simons v. Great Western Railway Company*, 18 C. B. 805; *Moore v. Great Northern Railway Company*, 10 L. R. Ir. 95. A condition that the carrier will not be liable for the overcrowding of cattle is unreasonable: *Corrigan v. Great Northern Railway Company*, 6 L. R. Ir. 90; so is one that the carrier will not be responsible for the correct selection of cattle: *M'Nally v. Lancashire and Yorkshire Railway Company*, 8 L. R. Ir. 81. A condition exonerating the carrier from the loss of the market by the consignor has been held good: *Beal v. South Devon Railway Company*, 5 H. & N. 875; in *Ex. Ch. 3 H. & C. 337*; and there is no warranty that goods carried by a given train shall arrive at any particular hour: *Lord v. Midland Railway Company*, L. R. 2 C. P. 339. Mere mention of the value to a stationmaster is no declaration of value within the meaning of the Act, if it is not intended to operate as a declaration of value: *Robinson v. London and South-Western Railway Company*, 19 C. B. N. S. 51. The consignor is bound by his declaration of value and cannot afterwards shew the value of the goods was in excess of it: *M'Cance v. London and North-Western Railway Company*, 7 H. & N. 477, 3 H. & C. 343; *Nevin v. The Great Southern and Western Railway Company*, 30 L. R. Ir. 125. In *Hill v. London and North-Western Railway Company*, 42 L. T. 513, a ram was injured during transit, and it was held there was no recovery beyond £2 where there was no declaration of value.

³ *Robinson v. London and South-Western Railway Company*, 19 C. B. N. S. 51; *M'Cance v. London and North-Western Railway Company*, 7 H. & N. 477; *Lebeau v. General Steam Navigation Company*, L. R. 8 C. P. 88.

⁴ "The defendants," says *Cleasby, B.*, in *Harris v. Midland Railway Company*, 25 W. R. 63, where there was a special contract to carry cattle limiting liability to

Special contract must be signed.

Carriers Act 1830 unaffected.

Two views as to the interpretation of the Act.

First view.

(4) No special contract under the Act is to be binding unless signed by the person delivering property for carriage.¹

(5) The Carriers Act, 1830, is in all respects unaffected.²

There was for some time after the passing of the Act a very keen conflict as to its interpretation. Two different views were advanced.

The one view was that there was no distinction to be drawn between notices, conditions, or declarations on the one hand and special contracts on the other; that, in both instances, the judge at the trial was required to decide whether they were "just and reasonable," and that in both instances they must be signed.

Second view.

The other view was that, to guard against the unreasonableness of companies being allowed to protect themselves from responsibility for negligence, they were made liable for any loss or injury occasioned by the neglect or default of themselves or of their servants, notwithstanding any notice, condition, or declaration made and given by them contrary thereto; and that by the Act "every such notice, condition, or declaration" having the effect of limiting their liability in this respect was "to be null and void." Then, recognizing that by law a notice delivered to the owner of goods and assented to by him amounted to a contract, and further recognizing that the assent which is frequently given at the time of the delivery of goods is often without any actual knowledge of the conditions to which assent is by law presumed to be given, this second view regarded the Act as providing that only such conditions should be made "as shall be adjudged by the Court or judge, before whom any question relating thereto shall be tried, to be just and reasonable." Having thus dealt with notices, conditions, or declarations, it regards the section as proceeding to deal with special contracts, and as preserving the liberty secured by the Carriers' Act, 1830, to make special contracts with the owners of goods upon any terms of carriage which might mutually be arranged between them, provided such contract were signed.

Conflicting decisions maintaining these views.

Early decisions in favour of the former view are *Simons v.*

negligence only, "engage to carry safely but to be liable only for negligence. There was no evidence of negligence here, only conjecture. The injury must have been received during transit, but there is not sufficient evidence to shew how it was inflicted. The plaintiff must shew that death was caused by what he alleges. The fact of its being found in the condition alleged upon its arrival cannot be sufficient to shew that such a state of things was brought about by negligence of the defendants."

¹ The signature of a railway agent employed by the consignor to deliver, and by the carrier to receive, goods is sufficient to bind the sender: *Aldridge v. Great Western Railway Company*, 15 C. B. N. S. 582.

² *Shaw v. Great Western Railway Company* (1894), 1 Q. B. 373.

Great Western Railway Company¹ in the Common Pleas and *M'Manus v. Lancashire and Yorkshire Railway Company*² in the Exchequer Chamber; in favour of the latter, *Wise v. Great Western Railway Company*³ and *Pardington v. South Wales Railway Company*,⁴ both in the Exchequer. In *Peek v. North Staffordshire Railway* the controversy was carried up to the House of Lords, after a considerable division of opinion in the courts below. The judges were summoned to deliver their opinions, when a division of opinion again appeared. The former of the two views above stated was supported by Blackburn, Crompton, and Williams, JJ., and Cockburn, C.J.; and the latter by Willes, J., Martin, B., and Pollock, C.B. The majority of the House of Lords, the Lord Chancellor (Westbury) and Lords Cranworth and Wensleydale, agreed with the majority of the judges who delivered their opinions before them. Lord Chelmsford took the contrary view.

Peek v. North Staffordshire Railway.

Peek v. North Staffordshire Railway Company,⁵ then, decides—first, that between conditions and contracts there is no distinction; secondly, that a condition or contract, to bind a trader, must be in writing; thirdly, that every condition or contract made under the Act must be proved, to the satisfaction of the Court trying the case, to be just and reasonable; fourthly, that, whether a condition or contract, in either case it must be signed to be valid; and, fifthly, that the *onus* of shewing that the condition or contract is just and reasonable is on the company that alleges it.

Summary of points decided.

Though the authority of *Peek v. North Staffordshire Railway Company* is insuperable, the justice and wisdom of it have been called in question as late as 1883, in *Manchester, Sheffield, and Lincolnshire Railway Company v. Brown*,⁶ by Lord Bramwell, who says: "At the time it was decided," and from thence continuously until now, I have thought it was wrongly decided, as I know it was contrary to the intention of the framers of the Act; and this case confirms me in that opinion. For here is a contract made by a fishmonger and a carrier of fish who know their business, and whether it is just and reasonable is to be settled by me, who am neither fishmonger nor carrier, nor with any knowledge of their business. And although that case has been in existence for twenty years, and has been acted upon in Courts of law, if it were within my competency to overrule it I would do so, because

Manchester, Sheffield, and Lincolnshire Railway v. Brown.
Dictum of Lord Bramwell.

¹ 18 C. B. 805.

² 4 H. & N. 327.

³ 1 H. & N. 63.

⁴ 1 H. & N. 392.

⁵ 10 H. L. C. 473.

⁶ 8 App. Cas. 703, at 716; *Beal v. South Devon Railway Company*, 3 H. & C. 337.

⁷ In 1863.

it is impossible to say that people have regulated their contracts in reference to it. They have done nothing of the sort. What they have done is this: they have entered into their contracts without reference to it, and when it has become convenient they have broken those contracts, and, having had the benefit of them, they have turned round and have sought to avoid them."

Proposition established by *Manchester, Sheffield and Lincolnshire Railway v. Brown*.

Manchester, Sheffield, and Lincolnshire Railway Company v.

*Brown*¹ turned largely on the facts proved therein. It may, however, be cited as establishing the following proposition: that if the consignor has an offer *bona fide* made to him of having his goods carried upon terms just and reasonable, and voluntarily chooses in consideration of a pecuniary benefit, to exonerate the carrier from any part of his ordinary responsibility, a contract thus limiting the carrier's liability may be just and reasonable, though without the alternative option it would not be so.² This decision was supplemented by that in the *Great Western Railway Company v. M'Carthy*,³ where Lord Watson⁴ laid down that whether a condition is just and reasonable "is not a question of law, but a question of fact, or, it may be, a mixed question of law and fact, which must be determined according to the special circumstances of the contract in which it is inserted;" and though this be so, yet the judge "is not entitled to ask the jury to find the facts which he may consider it necessary to ascertain in forming his own judgment."⁵

Great Western Railway Company v. M'Carthy.

Sheridan v. The Midland Great Western Railway Company.

In the Irish case of *Sheridan v. The Midland Great Western Railway Company*,⁶ the reasonableness of the alternative offered is declared to be a question for the judge and not for the jury.

Liability for carrier's own negligence must be excluded either directly or by necessary implication.

In special contracts the liability of carriers for their own negligence must be excluded either directly or by necessary implication; for the law presumes that the liability continues if not manifestly excepted. Thus a condition that a carrier accepts no responsibility will not exclude liability for actual negligence;⁷

¹ 8 App. Cas. 703; *Ronan v. Midland Railway Company*, 14 L. R. Ir. 157; *Foreman v. Great Western Railway Company*, 38 L. T. 851.

² In *Lewis v. Great Western Railway Company*, 3 Q. B. D. 195, the case of the conveyance of some cheeses, this alternative was offered, and the contract was held just and reasonable. In *Ashendon v. London and Brighton Railway Company*, 5 Ex. D. 190, the action was in respect of a dog; no alternative was offered, and the contract was held not just and reasonable, as *Harrison v. London, Brighton, and South Coast Railway Company*, 2 B. & S. 122, is overruled by *Peek v. North Staffordshire Railway Company*, 10 H. L. C. 473. See *Shaw v. Great Western Railway Company* (1894), 1 Q. B. 373.

³ 12 App. Cas. 218; cp. *M'Nally v. Lancashire and Yorkshire Railway Company*, 8 L. R. Ir. 81; *Moore v. Great Northern Railway Company*, 10 L. R. Ir. 95.

⁴ 12 App. Cas., at 233.

⁵ L. c. at 239.

⁶ 24 L. R. Ir. 146.

⁷ *Martin v. Great Indian Peninsula Railway Company*, L. R. 3 Ex. 9.

nor yet will one exonerating a carrier from liability for damage occasioned by kicking, plunging, or restiveness of a horse protect him where the restiveness is induced by his negligence;¹ but a condition exempting a carrier from all liability for loss or damage by delay in transit or from whatever other cause arising "is good to excuse the negligence of the carrier's servants."²

Again, a contract to carry goods "at the owner's risk" only exempts the carrier from the ordinary risks incurred by goods going along the railway, and not from liability for negligence,³ unless the consignor has notice that the carriers carry at a lower rate "where the sender relieves them from all liability of loss, damage, or delay;" when the contract must be interpreted by the sender's knowledge of its meaning, and will exonerate from liability for negligence.⁴ An exemption from liability for negligence does not carry immunity from the consequences of wilful misconduct.⁵ Mere mis-delivery, however, does not amount to wilful misconduct, and is no more than negligence;⁶ but if the consignee has refused to accept, and the goods are then delivered to a person with a name like that of the consignee, without inquiry, there is wilful misconduct.⁷

The great increase of intercommunication between railways, whereby goods can be forwarded from one end of the kingdom to another without break, has made very frequent arrangements by which goods are transferred from the company with whom the contract of carriage was originally made, through three or four or even more other companies, until they reach their destination. The legal effect of this, in case of loss on a part of the journey not on the line of the company with whom the contract was directly made, has been the subject of considerable difference of opinion, terminated, as is not uncommon in these cases, by a decision in the House of Lords.

The earliest of the cases on this point is *Muschamp v. Lancaster and Preston Railway Company*.⁸ A parcel was

Contract to carry at owner's risk only exempts from ordinary risks.

Goods transferred from the line of one company to that of another in order to facilitate conveyance.

Muschamp v. Lancaster and Preston Railway Company.

¹ *Gill v. Manchester Railway Company*, L. R. 8 Q. B. 186; *Moore v. Great Northern Railway Company*, 10 L. R. Ir. 95.

² *Manchester, Sheffield, and Lincolnshire Railway Company v. Brown*, 8 App. Cas.

703.

³ *Robinson v. Great Western Railway Company*, 35 L. J. C. P. 123; *D'Arc v. London and North-Western Railway Company*, L. R. 9 Q. B. 325; *Goldsmith v. Great Eastern Railway Company*, 44 L. T. 181; *Dixon v. Richelieu Navigation Company*, 15 Ont. App. 647.

⁴ *Lewis v. Great Western Railway Company*, 3 Q. B. D. 195, at 206.

⁵ *Ronan v. Midland Railway Company*, 14 L. R. Ir. 157.

⁶ *Stevens v. Great Western Railway Company*, 52 L. T. 324.

⁷ *Hoare v. Great Western Railway Company*, 37 L. T. (N. S.) 186. See *Webb v. Great Western Railway Company*, 26 W. R. 111; *Haynes v. Great Western Railway Company*, 41 L. T. 436.

⁸ (1841) 8 M. & W. 421; *Merchants' Despatch Transportation Company v. Hatley*, 14 Can. S. C. R. 572.

delivered at Lancaster to the defendants directed to a person at a place in Derbyshire. The defendants were proprietors of the line only so far as Preston. There the railway united with the line of another company by which the carriage should have been performed; who lost the parcel, for which the plaintiff sued. At the trial, before Rolfe, B., the learned judge stated the law to the jury to be that, where a common carrier takes into his care a parcel directed to a particular place, and does not by positive agreement limit his responsibility to a part only of the distance, there is *prima facie* evidence of an undertaking on his part to carry the parcel to the place to which it is directed. A rule was moved for on this ruling, alleging misdirection, which, on argument, was discharged, the opinion of the Court being summed up by Rolfe, B.:¹ "All convenience is one way, and there is no authority the other way." This decision was followed in *Watson v. Ambergate Railway Company*.²

Scothorn v.
South
Staffordshire
Railway
Company.

In *Scothorn v. South Staffordshire Railway Company*³ a countermand was communicated to defendants' agent, who was authorized to deliver the goods according to the original contract. By some negligence that order was disobeyed, and the goods were lost. The earlier cases were distinguished on this ground, and the decision turned mainly on the correct construction of the contract being that the defendants were to procure their agents to deliver according to the plaintiff's directions; as they had not done so, and, in consequence, a loss had been occasioned, they were bound to make it good.

Collins v.
Bristol and
Exeter
Railway
Company.

Collins v. Bristol and Exeter Railway Company is the leading case on this line of decisions.⁴ The principle upon which *Muschamp v. Lancaster and Preston Junction Railway Company* was decided was accepted on all sides as good, and as Crompton, J., said, speaking of that case in the House of Lords,⁵ was "acted upon by judges and juries without any doubt at almost every sittings and assizes." The effect of it was nevertheless sought to be eluded on the ground of a condition in the contract with the Great Western Railway Company, by which the company were not to be held carriers beyond the extent of their own railway, but were to receive the entire sum, out of which they were first to pay themselves as carriers on their own line, and then, as forwarding agents, to pay the residue to the next railway or other carrier, and were to be responsible no further than the extent of

¹ 8 M. & W. at 430.

² (1853) 8 Ex. 341.

³ 15 Jur. 448.

⁴ 7 H. L. C. 194; followed *M'Millan v. Grand Trunk Railway Company*, 15 Ont. App. 14, a case worth referring to.

⁵ 7 H. L. C. at 212.

their own line. The contention was that this made the contract beyond the Great Western line a contract with common carriers merely, the condition determining so soon as the limits of the Great Western system were passed. The facts, as proved at the trial before Williams, J. (who reserved leave to enter a nonsuit if there was no evidence to go to the jury in support of the plaintiff's case), shewed that the plaintiff delivered at the station of the Great Western Railway Company at Bath a van-load of furniture to be conveyed to Torquay. The plaintiff signed a receipt-note, headed: "Bath Station.—To the Great Western Railway Company.—Receive the under-mentioned goods on the conditions stated on the other side to be sent to Torquay Station, and delivered to the plaintiff or his agent." One condition was that the company would not be answerable for loss or damage by fire. Another condition was that the company would not be responsible for loss or damage to goods beyond the limits of their railway. The van was placed on a truck and conveyed to Bristol, where the Great Western line ended and the defendants' began. The same truck and guard went with the van to Exeter, where the defendants' line ended, and was joined by the line of the South Devon Railway, which ran to Torquay. While the van and furniture were at the defendants' station at Exeter they were accidentally destroyed by fire. The plaintiff sued the Bristol and Exeter Company, on whose line the accident happened, for the loss. They objected that the conditions governed the whole of the transport and exempted them from liability. A verdict was entered for the plaintiff. A rule was then obtained and made absolute in the Court of Exchequer, on the ground that there was only one contract to carry the goods from Bath to Torquay, and that the company were under the "conditions," expressly exempted from liability to loss by fire.¹ In the Exchequer Chamber² this was reversed, as the Great Western Railway Company received the goods to be carried on their line subject to the stipulation against loss by fire, and discharged themselves by forwarding the goods to be carried by the defendants; and, there being no evidence of the terms on which the goods were to be carried on the defendants' line, they must be treated as having received them as common carriers, and were consequently liable for their loss. The case was then taken to the House of Lords, and the judges were summoned. The majority³ agreed with the

View of the
Court of
Exchequer.

View of the
Court of
Exchequer
Chamber.

¹ 11 Ex. 790.

² Before Coleridge, Wightman, Cresswell, Erle, Williams, Crompton, Crowder, and Willes, JJ.

³ These were Byles, J., Crompton, J., who delivered judgment in the Ex. Ch. and Williams and Wightman, JJ., who formed part of the Court.

Declaration of
the law in the
House of
Lords.

opinion of the Exchequer Chamber; two¹ were in favour of restoring the judgment of the Exchequer. The House of Lords² unanimously adopted the view of the Exchequer and reversed the judgment of the Exchequer Chamber, holding that the contract was entire for the whole journey, and that the goods were carried on the defendants' railway under the contract; so that the defendants were consequently either not liable at all, as no agreement was entered into with them, or that if the contract in any way attached, the exception as to the loss by fire accompanied it and freed them from liability.

In the course of the judgment it was pointed out that the case differed from *Muschamp v. Lancaster and Preston Junction Railway Company*³ in that there were no conditions in the contract, which was created merely by the receipt of a parcel by the railway company to be delivered at a place on another line. What, then, was the effect of the condition? "A contract," said Lord Chelmsford,⁴ "to convey goods from A. to B., with a condition that, for a certain part of the journey, the company will not be responsible, will be no more inconsistent with the absolute contract for the whole journey, than where a carrier undertakes to convey goods, with a condition that for a certain description of goods he will not be liable at all." Thus, assuming the condition limiting liability to apply to the Great Western line alone, it was not inconsistent with the condition that the carrier was not to be liable for loss by fire which was not so limited. Lord Cranworth, however, disposes of the whole contention that there was a right of action against the Bristol and Exeter Railway Company in the following words:⁵ "A person sending goods by a railway cannot be supposed to know, in the case of a continuous line, who are the owners of its different portions. He has a right to suppose, when the officers of the company at one extremity receive goods to be delivered at the other extremity, either that the whole line belongs to them, or, at all events, that they mean so to represent it, and that they contract on that footing." Thus, if the plaintiff had contracted with the Great Western Railway Company without limitation of liability, his action must be against them; if with limitation of liability, the contract was still with them, and against them the action must be brought, to the complete exoneration of auxiliary lines.⁶

¹ Martin, B., and Watson, B., had been appointed to the Bench after the decision of the Court of Exchequer.

² Lord Chelmsford, C., Lord Wensleydale, Lord Brougham, Lord Cranworth, and Lord Kingsdown.

³ 8 M. & W. 421.

⁴ 7 H. L. C., at 231.

⁵ 7 H. L. C., at 235.

⁶ The American view may be contrasted with the English rule above illustrated :

Care must be taken not to misunderstand this decision, which was given on the construction of the clauses of a written contract made between the plaintiff and the Great Western Railway Company. The plaintiff's contention was that, though by the contract with the Great Western Railway Company their responsibility was restricted to their own line, when the Bristol and Exeter Railway Company received the goods, they received them with the common law responsibility of common carriers, and were so liable for their loss by fire, while on their line. The defendants' contention was that the particular contract made was with the Great Western Railway Company, who were left to make their "own bargains with all the forwarding companies, receiving a certain sum from the consignor for the whole journey."¹ The conclusion of the House of Lords was that, whatever the intention of the Great Western Railway Company was, "it has not been expressed with sufficient clearness, and if it is important for that company, in future cases, to limit its liability to its own line, the terms of the present receipt note should be altered."² The contract of the Bristol and Exeter Railway Company was, accordingly, with the Great Western Railway Company, who were responsible to the plaintiff only on the terms of their contract with him. Thus the Bristol and Exeter Railway Company were not liable to the plaintiff on a contract, for they had no contract with him; neither were they liable as common carriers, for if the goods were received from the Great Western Railway Company on their own account and not while acting as agents for the plaintiff, the Exeter and Bristol Railway Company were not common carriers of the goods *quod* the plaintiff.

Point decided in *Collins v. Great Western Railway Company*.

It is manifest from this that the case does not at all affect the position of things where a contract like that indicated by

Considered and distinguished.

"A railroad company," said Field, J., in *Myrick v. Michigan Central Railroad Company*, 107 U. S. (17 Otto) 102, at 106, "is a carrier of goods for the public, and, as such, is bound to carry safely whatever goods are entrusted to it for transportation, within the course of its business to the end of its route, and there deposit them in a suitable place for their owners or consignees. If the road of the company connects with other roads, and goods are received for transportation beyond the termination of its own line, there is superadded to its duty as a common carrier that of a forwarder by the connecting line, that is, to deliver safely the goods to such line—the next carrier on the route beyond. This forwarding duty arises from the obligation implied in taking the goods for the point beyond its own line. The common law imposes no greater duty than this. If more is expected from the company receiving the shipment, there must be a special agreement for it. This is the doctrine of this court, although a different rule of liability is adopted in England and in some of the States. As was said in *Railroad Company v. Manufacturing Company*, 16 Wall. (U. S.) 318, at 324: 'It is unfortunate for the interests of commerce that there is any diversity of opinion on such a subject, especially in this country; but the rule that holds the carrier only liable to the extent of his own route, and for the safe storage and delivery to the next carrier is itself so just and reasonable that we do not hesitate to give it our sanction.' " See *Insurance Company v. Railroad Company*, 104 U. S. (14 Otto) 146, at 157.

¹ Per Lord Wensleydale, 7 H. L. C., at 239.

² Per Lord Wensleydale, *ibid*.

Mode of contracting to forward goods, with liability as common carrier attaching to the ultimate carrier.

Crompton, J.,¹ is entered into on the terms that: "We do not choose to undertake responsibilities for negligence and accidents beyond our limits of carriage, where we have no means of preventing such negligence or accident; and we will not, therefore, undertake the carriage of your goods from A. to B.; but we will be carriers as far as our line extends, or our vehicles go, and will be carriers no farther; but to protect you against the inconveniences and trouble to which you might be exposed if we only undertook to carry to the end of our line of carriage, we will undertake to forward the goods by the next carriers, and on so doing our liability shall cease, and our character of carriers shall be at an end; and for the purpose of so forwarding and of saving the trouble of two payments, we will take the whole fare, or you may pay as one charge at the end; but if we receive it we will receive it only as your agents for the purpose of ultimately paying the next carriers." Had the contract been of that sort, the Exeter and Bristol Railway Company would have been liable as common carriers to the plaintiff, on the ground of their exercise of a public employment and the receipt of the goods to be carried for the plaintiff for reward.²

Mytton v. Midland Railway Company.

Martin, B.'s judgment.

While *Collins v. Bristol and Exeter Railway Company* was before the House of Lords, and between the argument and the judgment,³ the Court of Exchequer decided *Mytton v. Midland Railway Company*,⁴ a case of passenger's luggage, in accordance with its previous decisions.⁵ On the facts it was held that there was only one contract, and that was with the South Wales Railway Company and not with the defendants. "We think," says Martin, B.,⁶ "that the principle of *Muschamp v. The Preston and Lancashire Railway Company* applies to this case; and as there was no contract with the Midland Railway Company the plaintiff fails in this action, and the defendants are entitled to our judgment." Had there been a partnership shewn, as was attempted to be done by arguing that a partnership was established by proof of the fact that the three companies concerned divided the fares according to the mileage travelled over each of the three lines traversed, the plaintiff would have had a right to sue any one of the companies who constituted the partnership.

Coxon v. Great Western Railway Company.

Shortly after the decision in *Collins's* case was given, *Coxon v. Great Western Railway Company*⁷ came on for argument in the

¹ 7 H. L. C. at 213.

² Per Holt, C.J., *Coggs v. Bernard*, 2 Ld. Raym., 909, at 918, 1 Sm. L. C. (9th ed.), 201, at 215.

³ June 13, 1859.

⁴ 4 H. & N. 615.

⁵ Cp. *Keys v. Belfast Railway Company*, 8 Ir. C. L. R. 167, 9 H. L. C. 556; *Hayes v. South Wales Railway Company*, 9 Ir. C. L. R. 474.

⁶ L. c. at 622.

⁷ (Feb. 11, 1860) 5 H. & N. 274.

Exchequer. The plaintiff sent some oxen to the Craven Arms Station of the Shrewsbury and Hereford Railway Company to be carried to Birmingham. A portion of this journey would be made over the Great Western Railway Company's line. The plaintiff's drover signed a way-bill with the following condition: "For the convenience of the owner, the company will receive the charges payable to other companies for conveyance of such cattle over their lines of railway, but the company will not be subject to liability for any loss, delay, default, or damage arising on such railway." One lump sum was charged for carriage, which was to be paid at Birmingham, on the Great Western Company's line. The oxen were placed in trucks belonging to the Great Western Railway Company; on the arrival of the train at Wolverhampton it was found that the bottom of one of the trucks was broken, that one of the oxen was dead, and that others were injured. In an action against the Great Western Railway Company it was contended by the defendants that the contract was with the Shrewsbury and Hereford Railway Company, and not with them. This defence was sustained, Bramwell, B., pointing out that in *Collins v. Bristol and Exeter Railway Company*¹ it was not said that a divided contract was impossible, but that such a contract had to be proved. He then examined the condition, and concluded that "they [the Shrewsbury and Hereford Railway Company] do not say that they will not carry on another railway, but only that they will not be liable for damage arising on such railway. So that there is an absolute refusal of liability for damage, but not a refusal to carry." That being so, the Court further held that this *prima facie* exoneration was not affected by anything in the contract.

In *Hooper v. London and North-Western Railway Company*,² where the facts are identical with *Mytton v. Midland Railway Company*,³ Denman and Lindley, JJ., treated *Mytton v. Midland Railway Company* as overruled, since it is inconsistent with *Foulkes v. Metropolitan Railway Company*.⁴ In *Hooper v. London and North-Western Railway Company*² the action was for delay in forwarding, and injury to, goods in a portmanteau which the defendants—not the company with whom the plaintiff had contracted, but a company into whose train he changed during the course of his journey in pursuance of his contract—had received to forward and had neglected to do so, whereby the contents were injured and the plaintiff deprived of their use. The facts disclosed

¹ 7 H. L. C. 194.

² 50 L. J. Q. B. 103; *Baldwin v. London, Chatham, and Dover Railway Company*, 9 Q. B. D. 582.

³ 4 H. & N. 615.

⁴ (1870) 5 C. P. D. 157.

Hooper v. London and North-Western Railway Company.
Considered.

Judgment of
Lindley, J.

something that "was therefore wrongful, not as a breach of contract, but as a wrongful act in itself."¹ "Whether there would be an implied contract with the defendant company," says Lindley, J.,² "may be a question of difficulty, but, as a matter of fact, the portmanteau was lawfully in their charge, and the fact of its not forthcoming at Euston involves the default of some one of the defendants' servants. The defendant company having received the portmanteau are responsible for its loss in accordance with the principle of *Foulkes v. The Metropolitan Railway Company*."

Comment.

The decision is merely that the plaintiff could not sue on an implied contract, and the case was argued throughout on the assumption that if no privity of contract could be made out, there could be no recovery; as clearly appears from the judgment of Martin, B.: "The only question is, whether there was any contract between the plaintiff and the Midland Railway Company, or whether the contract was not an entire contract with the South Wales Railway Company," and "there was no evidence whatever of any privity of the Midland Railway Company to that contract."³ As a decision on the existence of an implied contract it is not, and cannot be, overruled; and no other point than this, whatever the reason, and notwithstanding that the declaration was on the common law duty, was ever suggested in the argument or judgment.

Foulkes v.
Metropolitan
Company.

In this point of view *Foulkes v. Metropolitan Railway Company*⁴ conflicts with these earlier cases. Two points were there decided. First, that the contract was with the two railway companies, either of which could sue or be sued thereon—which *Bristol and Exeter Railway Company v. Collins*⁵ treated as a possible event, though one to be proved. The Court in *Foulkes's* case treated it as proved. Secondly, that there is a duty, independent of contract, not to do an act to injure another. It is to this duty that Thesiger, L.J., refers when he says:⁶ "I think that the true principle in such a case as the present is, that the company, so far as concerns its own line, in which term I include a line over which running powers are exercised, and its own acts and omissions, is under the same obligations in reference to the security of the passenger as it would have been if he had directly contracted with him." "This principle is a reasonable one, for underlying it is the fact that more or less directly or indirectly the carrying company

Judgment of
Thesiger, L.J.

¹ *Hayn v. Culliford*, 4 C. P. Div. 182. Cp. *Cramb v. Caledonian Railway Company*, 19 *Rettie* 1054.

² 50 L. J. Q. B. at 105.

³ 4 H. & N. at 621.

⁴ 5 C. P. Div. 157. See *Metropolitan Railway Company v. Great Western Railway Company*, 3 *Times L. R.* 113, where one company was held entitled to an indemnity against the other company.

⁵ 7 H. L. C. 194.

⁶ 5 C. P. Div. at 170.

derives a benefit from its carriage of the passenger, and should therefore come under some corresponding obligation towards him, and what more appropriate obligation can there be than the ordinary one undertaken by railway companies towards their passengers, namely, that of taking due and reasonable care for their safety."

Whether the omission in the earlier cases to discuss the obligation of the carrying company as distinguished from the contracting company, on the ground of duty apart from contract, was due to an impression that at least an implied contract must be shewn to found liability, or merely to an oversight, is now immaterial, since the decisions have placed the law beyond doubt, that while the contracting company is liable on the contract, the carrying company is also liable for any default that can be brought home to them.

The law as established in England, holding the company with whom the contract is directly made liable throughout the route, has been seriously doubted in America.¹ There the tendency of decisions has been to hold that the carrier is liable only for the extent of his own route, and for the safe storage and delivery to the next carrier.² This tendency has been supposed to have taken its rise from *Garside v. Trent and Mersey Navigation Company*,³ which is cited by Redfield, C.J.,⁴ as pointing to the existence of a rule to that effect. When examined the case shews that such a supposition is erroneous. The contract there, as alleged in the declaration, was to carry as common carriers from Stourport to Manchester, and thence to forward to Stockport. From the evidence it appeared that the course of business was that, when the goods arrived at Manchester, "if any carrier to the place of their destination be at Manchester ready to receive them, they are immediately delivered, upon payment of the carriage from Stourport to Manchester, and, if not, the defendants keep them in their warehouse till a carrier arrive to whom they may be delivered on making the above payment, the defendants not charging anything for lodging and keeping the goods in their warehouse." The goods were consumed by an accidental fire after their arrival in Manchester, and before any carrier came from Stockport to whom they could be delivered. The Court held that the holding of the goods was as warehousemen, "not for the convenience of the carrier, but of the owner of the goods,"⁵ and that, as there was no *laches*, the defendants were not liable. It will be seen, then, that so far is

Carrying company liable irrespective of contract.

Law in America.

Garside v. Trent and Mersey Navigation Company.

¹ For a discussion of the English and American rules, see Albany Law Journal, vol. iii. 485; Am. Law Rev., vol. ii. 426.

² See cases collected, Redfield, Carriers, § 181, n. 9, and *ante*, 1133 n.

³ 4 T. R. 581.

⁴ Carriers, § 181.

⁵ *L. c.* per Buller, J., at 582.

this from being a decision that the carrier is only liable to the extent of his own route, that the facts of the case would not allow the question to be raised; and that the real decision was that on the facts the defendants were not carriers at all, but warehousemen, who are not insurers; so that, on an accident happening while they are in charge of goods, default of some sort must be shewn to render them liable.

Hyde v. Trent
and Mersey
Navigation
Company.

With *Garside v. Trent and Mersey Navigation Company* should be considered the subsequent case against the same defendants, *Hyde v. Trent and Mersey Navigation Company*,¹ where more, though slight, countenance is given to the American view. The plaintiffs delivered to the defendants eighteen bags of cotton to be safely carried "from Gainsborough to Manchester, and there to be delivered to the plaintiffs." There was a second count for other goods. The goods were put on board the defendants' barges and were conveyed to Manchester, and there landed upon the quay and lodged in the warehouse, where they were consumed by an accidental fire the same night. The usage had uniformly been for the cotton merchants to have their goods conveyed to their own warehouses in carts furnished by the defendants. Formerly the defendants employed their own carts for this, but had latterly given up the business of carting, together with the profits, to a person in their employ, whom the plaintiffs knew to have taken it over. The question was whether the defendants were liable as common carriers, or whether the transit had ceased as far as they were concerned, and the goods were held by them as warehousemen pending delivery to the carter. The case was decided on the wording of the contract, "to Manchester there to be delivered," on which words the Court were of opinion that the defendants held the goods as carriers till they were delivered. On the more general question there was a difference of opinion, Lord Kenyon, C.J., dissenting from the rest of the Court, and being of opinion that the fact of the notoriety of the defendants' practice to hand over the goods to the carter to carry imposed a limit to their liability as carriers had it not been for the special terms. The rest of the Court were of opinion that "the carriers have the direction of the goods, and are responsible for them until they are delivered to the owner."²

Dissent of
Lord Kenyon,
C.J.

Garside v.
Trent and Mer-
sey Company
distinguished.

The case of *Garside* was distinguished, since there, by the contract, the carrier's duty was terminated at Manchester, while here the general duty was to carry, or to procure to be carried, further, and was likened "to the case of an innkeeper who

¹ 5 T. R. 389.

² *L. c.* per Buller, J., at 397.

agrees with his head ostler that the latter shall supply the customers with post-horses; in which case if goods were lost the innkeeper is liable, because he holds himself out to the public as the responsible person, as his engagement with his servant cannot vary the contract between him and the public."

Neither of these cases, then, is an authority for the view taken in the American decisions, though some countenance for it may be derived from what Lord Kenyon, C.J., said in *Hyde's case*.¹ But this view was dissented from by the other members of the Court, and was not the point of the actual decision.²

There are, however, in the American courts many cases that hold the carrier liable beyond the limits of his own route, upon the ground of a special undertaking, express or implied; in most of these cases the matter is for the jury to draw, or refuse to draw, an inference to that effect from the facts.³

It makes no difference to the liability that the goods are sent partly by sea, and are injured on the sea voyage; for the Courts infer a contract to carry through.⁴

Where, as in *Gill v. Manchester Railway Company*,⁵ the traffic of a railway is carried on for the joint benefit of two companies, either may be sued. For the constitution of such a liability, however, there must be some agreement, the effect of which is to constitute one company the agent of the other, so as to bring the matter within the principle stated by Lord Cranworth in *Cox v. Hickman*:⁶ "The real ground of liability is that the trade is carried on by persons acting on his [the defendant's] behalf. When that is the case, he is liable to the trade obligations, and entitled to its profits or to a share of them. . . . The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other." Where goods are delivered to the agent of two companies, at a place where only one of the companies has a station, and are handed by him to that company to go by the line of the other, there is evidence of a contract for the whole distance by the first

Inconsistent cases.

Rule not affected by the transit being partially by sea.

Gill v. Manchester Railway Company.

¹ *Hyde v. Trent and Mersey Navigation*, 5 T. R. 389, at 395.

² The case of *Condon v. Marquette, &c. Railroad Company*, 54 Am. R. 367, may be referred to for the American decisions. It lays down—one judge dissenting—that, if goods to be transferred from one carrier to another are merely stored in a warehouse whence the other carrier is in the habit of taking them at his convenience, the common carrier's liability continues while they are so stored. *Ante*, 1009.

³ *E.g.*, *Weed v. Saratoga and Schenectady Railroad Company*, 19 Wend. (N. Y.) 534. These cases are considered in a note to Story, Bailm. § 538.

⁴ *Wilby v. West Cornwall Railway Company*, 2 H. & N. 703; *Doolan v. Midland Railway Company*, 2 App. Cas. 792.

⁵ L. R. 8 Q. B. 186.

⁶ 8 H. L. C. at 306; see per Lord Wensleydale at 315. See, also, per Bramwell L.J., *Foulkes v. Metropolitan District Railway Company*, 5 C. P. Div. 157, at 158.

company.¹ And where there is a written contract for carriage to a particular station, parol evidence may be given of a further contract to carry to a remoter station.²

Aldridge v.
Great Western
Railway
Company.

Aldridge v. Great Western Railway Company³ decided three points of importance.

First, that in cases where the contract is, in addition to carriage over the company's own line, to forward over a line not under the control of the contracting party, and for which no extra payment is received, a condition that the contracting company is not to be responsible for loss or delay on the further line is just and reasonable.

Secondly, that the liability of a railway company for "empties" is not that of a gratuitous bailee, because the company may be justly considered as having had the carriage of the empties prepaid in the shape of the previous payment for the carriage of the same packages when full; so that the contract includes the obligation on the railway to carry the "empties" back without further charge.

Thirdly, a special contract under the Railway and Canal Traffic Act, 1854, may be signed by the carrier employed to cart and deliver between the consignor and the railway company though he is the common agent of both parties.⁴

Liability for
the convey-
ance of live
stock.

There has been some doubt whether the common law liability of carriers extends to live stock conveyed by them. It has never been necessary to decide the point since the carriage of cattle is universally a matter of special contract. On principle, it would seem that the liability of bailees of cattle would be less than that of insurers, or at least that of any number of cases of injury arising to cattle in the hands of bailees, the probability of the injury in any case affecting the bailee with liability would be greatly less than in most other cases; since harm may happen to cattle, despite all precautions, through the vices of their disposition or through a casual impulse, impossible to guard against, seizing them. It has been said that in this latter event the carrier is protected by reason of the implied exception to the carrier's liability arising from internal defect in the subject of the bailment to him.⁵ It seems, however, an unsatisfactory method to treat that as an exception to a rule which is an ever present quality in all the cases under the rule, and not to treat the

¹ Webber v. Great Western Railway Company, 4 H. & C. 582.

² Malpas v. London and South-Western Railway Company, L. R. 1 C. P. 336; commenting on Jeffrey v. Walton, 1 Stark. (N. P.) 267.

³ 15 C. B. N. S. 582.

⁴ Citing Sugden Vendors and Purchasers (14th ed.), 147.

⁵ Blower v. Great Western Railway Company L. R. 7 C. P. 655, per Willes, J., at 662. *Ante*, 1066, and 1097.

class itself as an exception to the broader rule of the carrier's liability.

The greater number of the authorities on the subject point to the exclusion of cattle from the list of things carried with the common carrier's liability, though there is very weighty authority, as well as the latest, for the other view. In *Carr v. Lancashire and Yorkshire Railway Company*,¹ Parke, B., intimates a doubt whether a carrier is a common carrier with regard to cattle. "Most certainly," he says, "every common carrier is bound only to carry goods of that description which his public calling requires him to carry." And in *M'Manus v. Lancashire and Yorkshire Railway Company*,² Martin, B., said: "We are able to decide this case without referring to the second point made by the defendants, viz., the alleged distinction between the liability of carriers as to the conveyance of horses and live stock and ordinary goods; but should the question ever arise, we think that the observation that fell from Mr. Baron Parke in *Carr v. Lancashire and Yorkshire Railway Company* is entitled to much consideration."

The view of the law that railway companies are not common carriers of cattle further appears to have been acted upon in *Moffat v. Great Western Railway Company*,³ where, in an action for the loss of a horse, on a declaration against the defendants as carriers, Keating, J., told the jury that the question for them to decide was whether defendants had been guilty of negligence in the carriage of the horse, meaning by carriage their treatment of the animal from the moment they took it into their custody. "The company were not responsible for accidents of a nature beyond the range of ordinary risks, but they were for anything resulting from the negligence of their servants."

In *Blower v. Great Western Railway Company*,⁴ however, Willes, J., considers the point, and though he indicates that any difference there may be between his view and that of Parke, B., may be referred to a difference in words and not in substance, he expresses a clear opinion that railway companies are common carriers of cattle. He arrives at this conclusion by eliminating any liability for the acts of animals of an extraordinary character by reason of a vice inherent in them or of a disposition producing frenzy or unruly conduct; either of which classes of acts he regards as springing from something naturally inherent in

¹ 7 Ex. 707. See, too, *Chippendale v. Lancashire and Yorkshire Railway Company*, 21 L. J. Q. B. 22; *Great Northern Railway Company v. Morville*, 21 L. J. Q. B. 319; *Shaw v. York and North Midland Railway Company*, 13 Q. B. 347.

² 2 H. & N. 693, in Ex. Ch. 4 H. & N. 327.

³ L. C. at 702.

⁴ 15 L. T. (N. S.) 630.

⁵ L. R. 7 C. P. 655.

the animal, and which by its natural development leads to the mischief. An insurer is bound to safeguard the thing entrusted to him, yet he is not liable for a loss necessarily incidental to the property insured; that being so, in the case of animals, the carrier is liable as a common carrier, subject to his non-liability for injuries arising from ordinary inherent qualities.

Whether, then, a railway company are common carriers of animals, with a liability ceasing with the development of inherent vice, or whether animals are held a separate class of chattels for transportation, on account of the existence in them, as a class, of inherent vice, the liability in regard to which is governed by its own law, is of no great practical importance so long as it is recognized that for injuries arising from inherent vice the carrier is not responsible.

Combe v.
London and
South-Western
Railway
Company.

In *Combe v. London and South-Western Railway Company*,¹ the plaintiff brought his action for negligence in the carriage of a horse, the negligence alleged being the not providing a truck reasonably fit for the purpose. "The law," says Lord Coleridge,² C.J., "implies an undertaking on the part of the carrier to provide a reasonably fit truck for the conveyance of the horses." The rest of the Court reiterated the opinion that negligence was required to be shewn in order to give a right of action. Thus, it may be taken that the liability of carriers with regard to cattle is not absolute, but dependent on the proof of negligence.³

2. Of Passengers.

The liability of carriers of passengers⁴ for injuries sustained by a passenger through the negligence of their servants, though not strictly a subdivision of the law of bailments, may most conveniently be treated here.

First decision
in 1791.

This liability was first the subject of a reported decision in *White v. Boulton*⁵ in 1791. Counsel for the defendant there referred to a case said to have been tried before Lord Lough-

¹ 31 L. T. (N. S.) 613.

² L. c. at 615.

³ As to duty with regard to living animals, *Shaw v. Great Southern and Western Railway*, 8 L. R. Ir. 10. It is negligence to treat a horse like a mineral: *Pickering v. North-Eastern Railway Company*, 4 Times L. R. 7 (C. A.). As to injury to cows, *Smith v. Midland Railway Company*, 4 Times L. R. 68, distinguished *Ainsby v. Great Northern Railway Company*, 8 Times L. R. 143. *Ante*, 147. As to *ovine* on the company in conveyance of animals, *Prior v. London and South-Western Railway Company*, 2 Times L. R. 89. A railway company which holds itself out as willing to carry live stock is bound to provide suitable means of receiving them: *Covington Stockyards Company v. Keith*, 139 U. S. (32 Davis) 128.

⁴ A person driving his own carriage who gives a seat to another does not subject himself to the liability of a common carrier of passengers: *Moffatt v. Bateman*, L. R. 3 P. C. 115.

⁵ Peake (N. P.) 81.

borough C.J., in which his lordship had held that the proprietors of a mail-coach were not answerable for the negligence of their servants; saying that those coaches were not under the government of the proprietors, but the concern of the public, being established merely for the conveyance of letters; and therefore, if any person travelled in them he went at his own risk, and the law implied no promise for his safety. To this Lord Kenyon, C.J., answered, "he was certain no such determination had ever been made by Lord Loughborough. It was too absurd to enter into the head of any man. Doubts had been entertained by great lawyers in the last and beginning of the present century whether the Postmaster-General was liable for letters sent. He would not deliver any opinion on that point, as it had nothing to do with the present case; but when these coaches carried *passengers*, the proprietors of them were bound to carry them safely and properly."¹

Case before
Lord Lough-
borough, C.J.

Lord Kenyon,
C.J.'s criticism
thereon.

In 1797, in *Aston v. Heaven*, Eyre, C.J.,² laid down the rule in the following oft-quoted terms: "This action is founded entirely in negligence. It has been said by the counsel for the plaintiff, that wherever a case happens, even where there has been no negligence, he would take the opinion of the Court, whether defendants circumstanced as the present, that is, coach-owners, should be liable in all cases, except where the injury happens from the act of God or of the King's enemies. I am of opinion the cases of the loss of goods by carriers and the present are totally unlike. When that case does occur, he will be told that the carriers of goods are liable by the custom to guard against frauds they might be tempted to commit by taking goods entrusted to them to carry, and then pretending they had lost or been robbed of them; and because they can protect themselves; but there is no such rule in the case of the carriage of persons. This action stands on the ground of negligence alone." After commenting on the facts, he continued: "The immediate cause of the accident is agreed on all hands; the question, therefore, depends on the consideration of Whether there was any negligence in the driver? It is said he was driving with reins so loose that he could not readily command his horses; if that was the case, the defendants are liable; for a driver is answerable for the smallest negligence. But if this does not appear, and the accident appears to have arisen from any unforeseen accident or misfortune, as from the horses suddenly taking fright; in such case the defendants are not liable."

Aston v.
Heaven,
rule stated by
Eyre, C.J.

In *Dudley v. Smith*³ the plaintiff, an outside passenger on a

Dudley v.
Smith.

¹ *Ante* 1056.

² 2 Esp. (N. P.) 533, at 534.

³ (1808) 1 Camp. 167.

coach, was injured by being driven against a low archway of the inn, only nine feet nine inches from the ground, leading to the stable yard which was the end of the journey. When arrived before the archway the coachman requested her to alight, as the passage into the yard was very awkward. She said as the road was dirty she would rather be driven into the yard, which was the usual place for the inside passengers to alight. Lord Ellenborough, C.J., ruled that defendant was bound to carry the plaintiff from the usual place of taking up to the usual place of setting down, and that the driver before passing through any place that is dangerous is bound to inform the passengers of the full extent of the danger.

Christie v.
Griggs.

The law was also stated by Mansfield, C.J., in *Christie v. Griggs*.¹ "There was a difference," he said,² "between a contract to carry goods and a contract to carry passengers. For the goods the carrier was answerable at all events. But he did not warrant the safety of the passengers. His undertaking as to them went no farther than this—that, as far as human care and foresight could go, he would provide for their safe conveyance. Therefore, if the breaking down of the coach was purely accidental, the plaintiff had no remedy for the misfortune he had encountered."³

Harris v.
Costar.

In the subsequent case of *Harris v. Costar*,⁴ Serjeant Vaughan took the point that there was nothing in law requiring that "a passenger is to be carried, like a bale of goods, safely at all events;" and Best, C.J., replied: "I shall not say that there is any such contract," and ruled that the contract averred in the declaration was to be construed, "like all other instruments, taking the whole together, and meant that the defendants were to use due care."

Crofts v.
Waterhouse.

These cases were all at *Nisi Prius*; but at the end of the same year in which *Harris v. Costar*⁴ was decided, the obligation of a carrier of passengers came before the Court of Common Pleas in *Crofts v. Waterhouse*.⁵ The driver of a stage-coach upset his coach while turning a corner. Passing the same spot twelve hours before, a cottage had served him as a landmark;

¹ 2 Camp. 79. *Ansell v. Waterhouse*, 6 M. & S. 385, decides that an action against a common carrier for the overturning of a coach is in tort, and therefore it is not necessary that all the proprietors should be joined. *Ante*, 1057. *Post*, 1212.

² *L. c.* at 81.

³ In *Readhead v. Midland Railway Company*, L. R. 2 Q. B. 412, Blackburn, J., says, at 438: "Mansfield, C.J., here does not very accurately distinguish between the possible view of the case, that the misfortune might have arisen, though the vehicle was reasonably fit for the journey and so be purely accidental, and the possible view that the accident and the circumstances attending it shewed that the coach could not in fact be reasonably fit for the journey."

⁴ (1825) 1 C. & P. 636.

⁵ 3 Bing. 319; *Stokes v. Saltonstall*, 13 Pet. (U. S.) 181.

this had been pulled down in the interval. The judge directed the jury that, as there was no obstruction in the road, the driver ought to have kept within the limit of it. On motion for a new trial on the ground of misdirection, a rule was made absolute, on the ground that the question ought to have been put to the jury whether the deviation was the effect of negligence. "This action," said Best, C.J., "cannot be maintained, unless negligence be proved; and whether it be proved or not is for the determination of the jury, to whom in this case it was not submitted. The coachman must have competent skill, and must use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses, a coach and harness of sufficient strength and properly made; and also with lights by night. If there be the least failure in any one of these things, the duty of the coach proprietors is not fulfilled, and they are answerable for any injury or damage that happens. But with all these things, and when everything has been done that human prudence can suggest for the security of the passengers, an accident may happen. The lights may in a dark night be obscured by fog; the horses frightened; or, as it happened in the present case, the coachman may be deceived by a sudden alteration in objects near the road by which he had used to be directed on former journeys. It is not his fault, if having exerted proper skill and care, he from accident gets off the road; and the proprietors are not answerable for what happens from his doing so."¹

Conditions on which a carrier of passengers is to conduct his business laid down by Best, C.J.

The distinction between a carrier of goods and a carrier of passengers is summarised by Park, J., in the same case, as follows:² "A carrier of goods is liable in all events except the act of God or the King's enemies; a carrier of passengers is only liable for negligence."

Distinction between carrier of goods and carrier of passengers.

So far we have more prominently regarded the duty of the coachman. There was for some time more doubt in determining the duty of the proprietor in providing a vehicle in which the journey should be accomplished.

The first case with reference to this is *Israel v. Clark*,³ where the plaintiff sought to recover damages for an injury arising from the overturning of the defendant's coach in consequence of the axle-tree having broken. Lord Ellenborough, C.J., said that carriers of passengers "were bound by law to provide a sufficient carriage for the safe conveyance of the public who had occasion to travel by them. At all events, he would expect a clear land-worthiness in the carriage itself to be established."

Israel v. Clark.

¹ *L. c.* at 321.

² *L. c.* at 321.

³ (1803) 4 *Esp. (N.P.)* 259.

Christie v.
Griggs.

After this came *Christie v. Griggs*,¹ which has been before alluded to,² and in which the axle-tree of a coach snapped asunder at a place where there was a slight descent from the kennel crossing the road, and the plaintiff was thrown from the top of the coach. Mansfield, C.J., held, that "As the driver had been cleared of everything like negligence, the question for the jury would be as to the sufficiency of the coach. If the axle-tree was sound, as far as human eye could discover, the defendant was not liable."

Bretherton
v. Wood.

In *Bretherton v. Wood*,³ in the Exchequer Chamber, Dallas, C.J., uses ambiguous expressions treating the carrier's liability as to goods and passengers without discriminating between them. He says: "This action is on the case against a common carrier, upon whom a duty is imposed by the custom of the realm, or in other words, by the common law, to carry and convey their goods or passengers safely and securely, so that by their negligence or default no injury or damage happen. A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it."⁴

Bremner v.
Williams.

Then came *Bremner v. Williams*,⁵ where Best, C.J., considered that "every coach proprietor warrants to the public that his stage-coach is equal to the journey it undertakes," and that "it is the duty of a proprietor of a stage-coach to examine it previous to the commencement of every journey." In the subsequent case of *Crofts v. Waterhouse*⁶ the same judge says the coachman must be provided with "a coach and harness of sufficient strength and properly made;" and in *Harris v. Costar*,⁷ where the declaration was to carry "safely," Best, C.J., said that this meant to use "due care."⁸

Crofts v.
Waterhouse.

Harris v.
Costar.

Sharp v. Grey.

In *Sharp v. Grey*¹⁰ the extent of the proprietor's duty was directly involved in the decision. The axle-tree of the defendant's coach broke on a journey, whereby the plaintiff was thrown off it and sustained injury. It appeared that the axle-tree was an iron bar inclosed in a frame of wood consisting of four pieces bound together by clamps of iron fastened by screws. Before the journey the defendant's servants had examined this part of the vehicle in the usual way, when no defect was obvious

¹ (1809) 2 Camp. 79.

² *Ante*, 1144.

³ 3 B. & B. 54.

⁴ *L. c.* at 62.

⁵ *Ante*, 1136.

⁶ (1824) 1 C. & P. 414.

⁷ (1825) 3 Bing. 391, at 321.

⁸ 1 C. & P. 636; *Curtis v. Drinkwater*, 2 B. & Ad. 169, was a case where luggage was jolted on to plaintiff.

⁹ *Ante*, 900.

¹⁰ (1833) 9 Bing. 457. As to the various reports of the case and their discrepancies see note *L. R.* 2 Q. B. at 438.

to the sight. Upon investigation after the accident a defect was discovered in that portion of the iron bar which could only be examined by unscrewing the iron clamps and taking off the wooden frame. At the trial it was made a question whether that examination should have been made. Tindal, C.J., directed the jury to consider whether there had been that degree of vigilance on the part of the defendant which was required by his engagement to carry the plaintiff safely. A verdict being given for the plaintiff, a motion was made to set it aside on the ground of misdirection; as the defendant had conducted his business with all the caution that could be reasonably required. In refusing the rule, Gaselee and Bosanquet, JJ., thought the defendant bound to supply a roadworthy vehicle. Park, J., uses language which, as reported, is ambiguous; but the judgment of Alderson, J., is distinctly opposed to the notion of a warranty against latent and undiscoverable defects.¹ He says: "A coach proprietor is liable for all defects in his vehicle which can be seen at the time of construction, as well as for such as may exist afterwards and be discovered on investigation." Alderson, J.'s opinion was remarked on in *Grote v. Chester and Holyhead Railway Company*,² by Parke, B., who says: "In that case the coach proprietor is liable for an accident which arises from an imperfection in the vehicle although he has employed a clever and competent coachmaker." This reference is said by Mellor, J., in *Readhead v. Midland Railway Company*,³ to be "merely intended to express that a coach proprietor could not shelter himself from the consequences of using an unsafe coach by the fact that he had employed a competent coachmaker to make it—which differs materially from implying a warranty against a defect which no amount of care or skill could discover."

Direction to
the jury of
Tindal, C.J.

Parke, B., in
Grote v.
Chester and
Holyhead
Railway
Company.

The cases in the earlier part of the century were concerned with accidents happening to coaches merely, and were not of widely reaching importance; but, as in the other branches of carrier's law so also in this, the general construction of railways and the revolution thereby effected in the amount and methods of travelling immensely increased the need for authoritative legal decision.

Revolution
in the law
necessitated
by the con-
struction of
railways.

The two views tenable may be thus stated:—On the one hand, it was said that the obligation of a carrier of passengers to the passenger was to take every precaution to procure a vehicle reasonably sufficient for the journey it was to assist in perform-

Two views of
the carrier's
obligation:
(i) To take
every precau-
tion to procure
a vehicle
reasonably fit;
(ii) An abso-
lute obligation
to do so.

¹ See Montague Smith, J.'s judgment in *Readhead v. Midland Railway Company*, L. R. 4 Q. B. 379, at 387.

² 2 Ex. 251, at 255.

³ L. R. 2 Q. B. 412, at 424.

Law as laid
down in
Scotland.

In a Scotch case the jury were charged: "You are to say whether there was such appearance of defect as the eye of an artificer, applied with reasonable attention, could discover, and will take into consideration that the eye of an experienced person might discover defects imperceptible to others."¹ This was consequent on a ruling: "The rule then is, that if the carriage is sound as far as the human eye can discover the proprietors are not liable."

Law as laid
down by the
Supreme Court
of the United
States.
Judgment of
Harlan, J.

In the United States this law is laid down to the same effect, and with a minuteness and precision that render reproduction here useful. In *Pennsylvania Company v. Roy*,² after citing authorities,³ Harlan, J., thus continues: "These and many other adjudged cases, cited with approval in elementary treatises of acknowledged authority, shew that the carrier is required, as to passengers to observe the utmost caution characteristic of very careful, prudent men. He is responsible for injuries received by passengers in the course of their transportation which might have been avoided or guarded against by the exercise upon his part of extraordinary vigilance, aided by the highest skill. And this caution and vigilance must necessarily be extended to all the agencies or means employed by the carrier in the transportation of the passenger. Among the duties resting upon him is the important one of providing cars or vehicles adequate, that is, sufficiently secure, as to strength and other requisites, for the safe conveyance of passengers. That duty the law enforces with great strictness. For the slightest negligence or fault in this regard from which injury results to the passenger, the carrier is liable in damages." And in a previous passage on the same page of his

that case did not apply to the sale of a chattel; in *Randall v. Newson* the rule is that there is a *warranty* by the vendor that the chattel purchased is reasonably fit for the purpose for which it is bought, and there is no exception of latent defects. See Benjamin, *Sale* (4th ed.), 659, and the *Sale of Goods Act, 1893* (56 & 57 Vict. c. 71), s. 14. *Randall v. Newson* is unfavourably criticized in 2 Kent, Comm. (13th ed.) 480, n. 7, as "though perhaps supported by some general expressions in some earlier cases . . . contrary to the general tendency of the decisions." In England, however, the law is settled by the case in the face of various objections which else might be urged not without force. See *Mellish v. Motteux, Peake* (N.P.) 115, overruled in *Baglehole v. Walters*, 3 Camp. 154, confirmed *Pickering v. Dowson*, 4 Taunt. 779, on the effect of a sale with all faults.

¹ *Anderson v. Pyper* (1820), 2 Mur. 261, at 270. In the New York courts the doctrine that the carrier is absolutely bound to provide roadworthy vehicles, and is liable for the consequence of all defects irrespective of negligence, has been adopted: *Alden v. New York Central Railroad Company*, 26 N. Y. 102. The facts of this case have a very strong likeness to those in *Readhead v. Midland Railway Company*. The decision is the opposite way. The opposite view is taken in *Massachusetts v. Ingalls v. Billa*, 50 Mass. 1; *Moreland v. Boston Corporation*, 141 Mass. 31.

² 102 U. S. (12 Otto) 451, at 456.

³ *Philadelphia and Reading Railroad Company v. Derby*, 14 How. (U. S.) 468, followed in *Steamboat New World v. King*, 16 How. (U. S.) 469; *Stokes v. Saltonstall*, 13 Pet. (U. S.) 181, approved *Railroad Company v. Pollard*, 22 Wall. (U. S.) 341.

⁴ 2 Mur. at 268.

reported judgment the same learned judge sums up the carrier's duty thus: "Although the carrier does not warrant the safety of the passengers at all events, yet his undertaking and liability, as to them, go to the extent that he or his agents, when he acts by agents, shall possess competent skill, and, as far as human care and foresight can go, he will transport them safely." These expressions accurately convey the English law, which on this point may be looked on as identical with that of the United States.

The principles settled in *Readhead v. Midland Railway Company*¹ and *Francis v. Cockrell*² were applied in *Richardson v. Great Eastern Railway Company*,³ though with some difficulty; since the decision of the Court of Common Pleas, overruling the decision of the judge at the trial, was itself overruled by the Court of Appeal. A coal-truck belonging to the Birmingham Waggon Company, which had been lent to a colliery company, came on the defendants' lines at Peterborough. The defendants were compelled by statute to forward foreign traffic—i.e., through traffic from other lines. At Peterborough an examination of the truck was made, and two defects were discovered. Notice was given to the Birmingham Waggon Company in order that they might remedy one of the defects, which interfered with the safety of the carriage; the other, which it was unnecessary immediately to remedy, was left for subsequent care. The first defect being repaired, the truck was sent on; when an accident occurred through a defect in the axle in no way connected with those previously mentioned. In consequence of the accident the plaintiff was injured. The question was whether the company were guilty of negligence in not making a more minute examination than they did; as there was no doubt that the crack, having reached the surface, might have been discovered by a more minute examination.

Three questions were left to the jury—First, whether the defect in the axle would have been discovered upon any fit and careful examination of it. The jury answered it would. Secondly, whether it was the duty of the defendants to examine the axle by scraping off the dirt and so minutely looking at it as to enable them to see the crack. The jury answered no. Thirdly, whether, if this was not their duty at first, it became so on discovering the two first-discovered defects. The answer of the jury was: "It was their duty to require from the Birmingham Waggon Company some distinct assurance that it had been thoroughly examined and repaired."

¹ L. R. 2 Q. B. 412, L. R. 4 Q. B. 379.

² L. R. 5 Q. B. 184, 501.

³ L. R. 10 C. P. 486, 1 C. P. Div. 342.

Richardson v. Great Eastern Railway Company.

Questions for the jury.

Kelly, C.B.'s,
view of the
effect of the
verdict.

Lord
Coleridge's
opinion to the
contrary
overruled in
the Court of
Appeal.

Jessel, M.R.'s,
view.

Rule as laid
down by
Jessel, M.R.

Kelly, C.B., was of opinion that the last answer was immaterial, and directed the jury to find a verdict for the defendants, reserving leave to move to enter a verdict for the plaintiff. The Court of Common Pleas made a rule absolute to do so, Lord Coleridge, C.J., holding the answer to the third question to be "most material." The judgment of Kelly, C.B., was, however, restored by the Court of Appeal, Jessel, M.R., saying, with reference to the third answer, "I do not think we ought to give any effect to this finding of the jury, and the case for the plaintiff therefore fails;" in which conclusion the rest of the Court concurred.¹

"The real question," said Jessel, M.R.,² "is whether the company were guilty of negligence in not making a more minute examination; for there is no doubt that the crack, having reached the surface, might have been discovered by a sufficiently minute examination. We must look to what is reasonable in reference to the exigencies of the case. The company cannot stop all foreign trucks and empty them for the purposes of a minute examination. If they were entitled to do so, it would practically destroy the right given by statute to other companies of having the through traffic forwarded, and give a monopoly to the company itself. The suggestion that they should do this is too absurd to bear discussion. It cannot be said that it is obligatory on the company to treat the foreign trucks so as to destroy the very object for which they were sent on the line—viz., for the purpose of through traffic. There must be some reasonable limit to the amount of examination required, and the substantial question was whether the mode of examination adopted by the company was reasonably satisfactory." The learned judge, having commented upon the three questions and the answers to them made by the jury, and their effects, thus laid down the rule:³ "If the defect discovered were such as ought reasonably to induce a person of experience to think that some other defect existed, or was likely to exist, then there would be a duty to examine further, but if the defect discovered had no probable connection with any other undiscovered defect, then I see no reason why any further or other examination should be made."⁴

¹ 1 C. P. Div. at 346.

² Cp. per Lord Westbury in *Daniel v. Metropolitan Railway Company*, L. R. 5 H. L. at 61.

³ 1 C. P. Div. at 344.

⁴ L. c. at 345.

⁵ Cockburn, C.J., deals with the same point in *Stokes v. Eastern Counties Railway Company*, 2 F. & F. 691. An American case of authority is *Ingalls v. Bills*, 50 Mass. 1; see also *Meier v. Pennsylvania Railroad Company*, 64 Pa. St. 225. In a New York case it was held that the duty on a railway company of inspecting cars of another company used on its road is just the same as if they were its own: *Goodrich v. New York Central Railroad Company*, 116 N. Y. 398, 15 Am. St. R. 410.

The question of the extent of the responsibility of a railway company for the waggons of consignors used on the company's line for the conveyance of the goods of their owners came up for discussion in *Watson v. North British Railway Company*.¹ The principle laid down was that the railway company are bound to use "all reasonable care and diligence" in their custody and management.

In the later case of *Barr v. Caledonian Railway Company*,² where waggons of the pursuer which had conveyed coal on the defenders' line were injured when empty on the return journey, the same point was again and more elaborately considered. The Court adopted the test approved in the earlier case: Lord M'Laren thus indicates the governing considerations:³ "I think it is a just and convenient rule, and it is certainly in accordance with the best traditions of our jurisprudence, that in the case of innominate contracts the obligations of the parties and the responsibility for negligence should be the same as in the case of the nearest known contract. This principle would lead to two conclusions:—(1) that the railway company is responsible for the safe carriage and delivery of the coals under a contract of carriage; (2) that the company is responsible for the care of the waggons as under a contract of location."

"The waggons were not being carried, but were being used as part of the apparatus for the carriage of goods over the company's line;" and the case is "quite different from the case of a railway carriage or waggon received by a railway company for delivery at a distinct place, and for which freight is paid."

These duties incumbent on a railway company cannot be shifted or evaded. Thus, a railway company is liable for defects causing injury to passengers in Pullman cars which they arrange with a car company to be run on their lines. "The law," says an United States case,⁴ citing a long list of text writers in support of the proposition, "will not permit a company engaged in the business of carrying persons for hire through any device or arrangement with a sleeping car company whose cars are used by the railroad company, and constitute a part of its train, to evade the duty of providing proper means for the safe conveyance of those whom it agreed to convey." In the case in question the Pullman car company had been sued jointly with the railway company, but had subsequently been discharged from the action. It does not, however, admit of doubt that they would

Responsibility of railway company for the waggons of consignors.
Watson v. North British Railway Company.

Barr v. Caledonian Railway Company.

Judgment of Lord M'Laren.

Railway Company liable for defect in Pullman cars

¹ 3 Rottie 637.

² 18 Rottie 139.

³ *L. c.* at 148.

⁴ *Pennsylvania Company v. Roy*, 102 U. S. (12 Otto) 451.

be liable for their own negligence although the railway company may also be liable.

Hyman v.
Nye.

The Court in *Hyman v. Nye*¹ was concerned with the liability of a jobmaster for the breaking down of a carriage which had been hired from him; and the consideration of that case, consequently, belongs more particularly to another branch of our subject, where it has already been noticed;² but, as the learned judge—Lindley, J.—who delivered the leading opinion held that the liability of the jobmaster with respect to the vehicle he supplies is identical with that of the carrier of passengers with respect to the carriage he supplies—viz., that “he is an insurer against all defects which care and skill can guard against”³—and laid down the rule governing in both with care and precision, this seems an appropriate place for extracting the rule he there formulates. The “duty,” he says, “appears to me to be to supply a carriage as fit for the purpose for which it is hired as care and skill can render it; and if whilst the carriage is being properly used for such purpose it breaks down, it becomes incumbent on the person who has let it out to shew that the break-down was, in the proper sense of the word, an accident not preventable by any care or skill. If he can prove this, as the defendant did in *Christie v. Griggs*,⁴ and as the railway company did in *Readhead v. Midland Railway Company*,⁵ he will not be liable; but no proof short of this will exonerate him.”

Who is a
passenger.

We have considered what the duty of a carrier of passengers is to those whom he carries, but we have not yet inquired what is sufficient to constitute a person a member of the class to whom the duty is owing.

A passenger has been defined⁶ as “a person who undertakes, with the consent of the carrier, to travel in the conveyance provided by the latter otherwise than in the service of the carrier as such.” And again, as “one who travels in some public conveyance by virtue of a contract, express or implied, with the

¹ 6 Q. B. D. 685.

² *Ante*, 954.

³ *L. c.* at 687.

⁴ 2 Camp. 80.

⁵ *L. R.* 2 Q. B. 412, *L. R.* 4 Q. B. 379. Cp. *Jones v. Page*, 15 *L. T.* (N. S.) 619; *Marnar v. Banks*, 17 *L. T.* (N. S.) 147.

⁶ *Shearman and Redfield, Negligence* (4th ed.), § 488. *McDonough v. Metropolitan Railroad Company*, 137 Mass. 210, held the fact that a boy had not taken his seat in a tramcar when he was injured did not prevent his being a “passenger.” Where a person intending to travel by railway lost his train and waited in the station for a tramcar “a few minutes” till the lights were put out, and then was injured while attempting to leave, it was held he “remained at his own risk”: *Heinlein v. Boston, &c. Railroad Company*, 147 Mass. 136, 9 Am. St. R. 676. This case would probably not be followed in England. Cp. *Great Western Railway Company v. Bunch*, 13 App. Cas. 31; *post*, 1221.

carrier, as to the payment of fare, or that which is accepted as an equivalent therefor."¹

Neither of these definitions is perfectly satisfactory; and perhaps a perfectly satisfactory definition is unattainable in view of the frequent complication of circumstances in which the state of a passenger is constituted. The cases go to shew that the relationship may arise from very slight circumstances, and when constituted the whole duty of a carrier to a passenger forthwith attaches. Neither entry into the conveyance nor payment of the fare is essential to the relation; being within the waiting-room waiting for a carriage may make a person as effectually a passenger as if actually seated in the conveyance itself.²

Definitions criticized.

In *Great Northern Railway Company v. Harrison*³ the contention was that the plaintiff was entitled to recover for injuries received while travelling on the defendants' railway if there was any evidence, however small, that he was in the defendants' railway carriage by the licence of the company. The evidence shewed there was a practice of allowing the reporters of a London newspaper going down to country races to travel on the defendants' line free. The reporter was for this purpose supplied with a ticket with the name of a person in the reporting department of the newspaper written on it. It purporting to be not transferable, and contained the intimation that any person other than he whose name was inscribed using the pass would be liable to the penalty which a passenger incurs by travelling without having paid his fare. The plaintiff, acting in good faith and while engaged on the business of his paper, went to the station with a ticket as described, but with the name of another reporter in the same department as himself written on it. He showed the ticket to a porter, who said, "All right," and put him in a carriage. The plaintiff and other persons had previously travelled with similar tickets not bearing the name of those who used them. An accident happened during the

Great Northern Railway Company v. Harrison.

¹ *Bricker v. Philadelphia, &c. Railroad Company*, 132 Pa. St. 1, at 4, 19 Am. St. R. 585. A variety of definitions of "passenger" are collected and commented on in *Pennsylvania Railroad Company v. Price*, 96 Pa. St. 256, at 267.

² *Gordon v. Grand Street and New Town Railroad Company*, 40 Barb. (N. Y.) 546; *Russ v. "The War Eagle"*, 14 Iowa 363; *Warren v. Fitchburg Railroad Company*, 90 Mass. 227; *Hamilton v. Caledonian Railway Company*, 19 Dunlop 457.

³ 10 Ex. 376. *Skinner v. London and Brighton Railway Company*, 5 Ex. 787, is cited as an authority to shew that a passenger may maintain an action for the negligence of a company in whose train he lawfully is, whether he has received a ticket or not: see *Brown and Theobald, Law of Railways*, 297. The decision goes no further than that in that case there was a question for the jury. *Way v. Chicago Railroad Company*, 52 Am. St. R. 431, is the case of an injury arising while falsely personating some one entitled to a not transferable ticket. The company were held not liable. In a note to the report other cases bearing on the point are collected.

journey, and the plaintiff, being injured, brought his action. The defendants submitted at the trial that there should be a nonsuit, which the judge refused and the jury found for the plaintiff.

Wide interpretation given by the Court.

On a bill of exceptions, the Exchequer Chamber held that there was "such evidence of a licence as would make it wrong to say that the plaintiff was a trespasser." The effect of the decision is to apply the obligation attaching to a passenger on the part of a railway to all persons lawfully on the railway and to admit evidence to shew the character in which a person is thus travelling, even where the *prima facie* conditions constitutive of lawful travelling appear to have been violated.

Austin v. Great Western Railway Company.

The breadth of this principle was, if possible, extended in *Austin v. Great Western Railway Company*,¹ where the mother of the plaintiff, a child of just over three years old, took a ticket for herself, at the time having the plaintiff, in her arms, by one of the trains on the defendants' railway, but did not take a ticket for the plaintiff; though by 7 & 8 Vict. c. 85, s. 6, the defendants were entitled to half the fare charged for an adult in respect of all children between three and twelve years of age, and were not allowed to charge for children under three years of age. In the course of the journey an accident happened to the train, and the plaintiff's leg was broken. The plaintiff recovered in an action; whereupon the Court was moved on the part of the defendants, on the ground that the plaintiff was not lawfully a passenger, as there had been concealment, which was equivalent to a fraud, in the circumstances attending his being in the carriage of the company. The verdict of the jury was, however, sustained by the Queen's Bench. Blackburn, J., thus stated the principle applicable:² "I think that what was said in the case of *Marshall v. Newcastle and Berwick Railway Company*³ was quite correct. It was there laid down that the right which a passenger by railway has to be carried safely, does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely. If there had been fraud on the part of the plaintiff, or if the plaintiff had been taken into the train without the defendants' authority, no such duty would arise. Whether the mother's fraud could be treated as the fraud of the child so as to bring the present case within the principle of the cases which have been referred to we need not now inquire. The averment of fraud which may be thought to make the plea

Blackburn, J.'s, statement of a railway company's duty to those carried by them.

¹ L. R. 2 Q. B. 442. Cp. *ante*, 192 and 201. See *Walker v. Great Northern Railway Company of Ireland*, 28 L. R. Ir. 69, and *ante*, 84.

² L. R. 2 Q. B. at 445.

³ 11 C. B. 655.

valid is disproved. We must take it that the child, without fault and through an honest mistake on the mother's part, was taken into the train by the railway company, and received as a passenger by their servants with their authority. . . . It certainly seems to me that a duty to carry safely arises under those circumstances."

In the subsequent case of *Foulkes v. Metropolitan District Railway Company*,¹ Thesiger, L.J., examines and classifies the decisions with regard to the circumstances in which the rights of a passenger as against a carrier may arise. He treats them in four classes.²

Foulkes v. Metropolitan District Railway Company.

1. Where a railway company issues a ticket for a journey partly on its own line and partly on that of another company.

Four classes of decisions stated by Thesiger, L.J.

In this case the company issuing the ticket is *prima facie* responsible for injuries caused by negligence throughout the whole route.³

2. Where, as between the company and the individual passenger, though there is no contract, there are circumstances which raise a presumption that the person carried is not unlawfully in the company's carriage—*e.g.*, in the case of a servant travelling with his master,⁴ or in the case of a child travelling with his mother.⁵

In this case a duty is implied by law.

3. Where, as between the carrier and the passenger, there may be a contract; but the performance of the carrier's portion of it has devolved on some other person.

In this case such other person is liable for the default⁶ as well as the carrier, who is liable on his contract.

¹ 5 C. P. Div. 157, at 168; *Norton v. Western Railroad Corporation*, 15 N. Y. 444. As to acquiring rights as a passenger, *Pennsylvania Railroad Company v. Price*, 96 Pa. St. 256, reversed on the construction of a local statute, *Price v. Pennsylvania Railroad Company*, 113 U. S. (6 Davis) 218. *McVeety v. St. Paul, &c. Railway Company*, 22 Am. St. R. 728, deals with circumstances where a traveller by railway loses the rights of a passenger.

² 5 C. P. Div. at 168.

³ *Great Western Railway Company v. Blake*, 7 H. & N. 987, at 991; *Thomas v. Rhymney Railway Company*, L. R. 5 Q. B. 226, in Ex. Ch. L. R. 6 Q. B. 266. See *John v. Bacon*, L. R. 5 C. P. 437.

⁴ *Marshall v. York, Newcastle, and Berwick Railway Company*, 11 C. B. 655.

⁵ *Anstin v. Great Western Railway Company*, L. R. 2 Q. B. 442. The case of *Stockdale v. Lancashire and Yorkshire Railway Company*, 11 W. R. 650, seems a better illustration, at any rate a more extreme illustration, than either of those given in the text. The plaintiff, with the guard's permission, got into his van; when the train got to its destination the van was not opposite the platform. In attempting to get out she was injured. Held, that as she got into the van at the invitation and under the superintendence of the guard, the guard's van became a carriage for passengers, and there was a breach of duty in not allowing time for her to alight. See *post*, 1192.

⁶ *Dalyell v. Tyrer*, E. B. & E. 899, the case of a ferryman, unable on a certain day to work his ferry, who hired a boat and crew in substitution, the owner of which was held liable in the case of an accident to a regular customer of the ferryman. In *Reynolds v. North-Eastern Railway Company*, *Roscoe N. P.* (16th ed.), 735, A took a ticket of B railway company over the lines of B, C, and D railways; through negligence of C an accident happened, for which C the defendant company was held responsible. Cp. *ante*, 1130.

4. Where a railway company contracts to carry for a journey over a line upon which another company has running powers, with which other company there is an arrangement for mutual conveyance of passengers, and where the person with whom the contract of carriage is so made is carried by the company other than that with which the contract of carriage is made, and is injured while being so carried.

In this case the carrying company are under the same obligations in reference to the security of the passenger, and as to their own acts and omissions, as they would be under had it directly contracted with him.¹

"Nor can it matter," says Bramwell, L.J.,² "whether the defendants receive the fare by the hands of their own servants or those of others. . . . The defendants, I repeat, are the carriers, and the contract of carriage is with them. If the interest of the South Western in the matter affects this reasoning it would at the outside go to shew that the two companies are partners and the contract was with them jointly. . . . Suppose a receiver was appointed of the South Western tolls and takings; could it be contended that this money could be taken by him without the defendants being entitled to a share of it?"

In what circumstances a person not rightfully in a railway carriage is disentitled to recover.

The question suggested by the decision is—Is a person not rightfully in or about a railway carriage in all cases disentitled to recover for injuries sustained through the default of the company in or about whose carriage he is? The point was assumed in *Great Northern Railway Company v. Harrison*,³ as against an admitted trespasser; and there is the case of *Lygo v. Newbold*,⁴ which is a decision that a person of full age, who got into a cart without authority to do so, could not maintain an action by reason of the breaking down of the cart. The cart was, however, for the purpose of carrying luggage only, and not passengers; and though the servant in charge assented to the plaintiff riding, the owner had only provided a vehicle for one purpose, and could not reasonably be held liable when it was applied, without reference to him, for another.⁵

¹ In an omnibus case, *Brien v. Bennett*, 8 C. & P. 724, holding up a finger to the driver, and the stoppage of the omnibus in consequence, was held evidence to go to the jury to support a declaration as to the stopping of the omnibus implying a consent to take plaintiff as a passenger. See also *Cooke v. Midland Railway Company*, 9 Times L. R. 147 (C. A.).

² 5 C. P. Div. at 158.

³ 10 Ex. 376.

⁴ 9 Ex. 302. Cp. *ante*, 797.

⁵ *Railroad Company v. Jones*, 95 U. S. (5 Otto) 439. Cp. *Kentucky Central Railroad Company v. Thomas's Administrators*, 42 Am. R. 208. This distinction has received judicial sanction in America, where, the driver of a car having permitted a person to ride on his car without pay, but without any collusion for the purpose of defrauding the company, it was held, on the person suing for injuries received while so riding, that the permitting one to ride without pay is not outside the scope of the

There is no doubt that a difference of duty exists on the part of a railway company in guarding against injuries to trespassers, and in safeguarding their own passengers. The duty in the latter case is to use "the utmost care and diligence which can be bestowed by human skill and foresight."¹ In the former the duty "rests merely upon grounds of general humanity and respect for the rights of others, and requires the carrier so to perform the transportation service as not wantonly or carelessly to be an aggressor towards third persons."² But it is not the law that a person whose title as a passenger is defective may be treated as a trespasser.³ In the frequent cases of people hurrying into trains about to start, with no time to take tickets; of people getting into wrong trains; or of people carried beyond their distance—in all cases travelling without tickets, and without direct authorization from the companies—it is impossible to say the law will put them in the position of mere trespassers.⁴ The driver's duty, although a violation of instructions for which he is responsible to his master, yet still an act affecting the master with liability. In this case the car was for the conveyance of passengers: *Wilton v. Middlesex Railroad Company*, 107 Mass. 108. Cp. *ante*, 1157 n. ⁵.

¹ *Chicago, &c. Railroad Company v. Mehlisack*, 19 Am. St. R. 17, at 20.

² *Ibid.*

³ *Chicago, &c. Railroad Company v. Mehlisack*, 19 Am. St. R. 17; *Bricker v. Philadelphia and Reading Railroad Company*, 132 Pa. St. 1, 19 Am. St. R. 585.

⁴ As to what their position is, see *Arnold v. Pennsylvania Railroad Company*, 115 Pa. St. 135, 2 Am. St. R. 542, and note. As to travelling without a ticket in violation of a bye-law, *Dearden v. Townsend*, L. R. 1 Q. B. 10. As to absence of intention to defraud, *Bentham v. Hoyle*, 3 Q. B. D. 289. As to liability to conviction under 8 & 9 Vict. c. 20, s. 103, for travelling without having previously paid the fare, with intent to avoid payment, where a person bought the "forward half" of a non-transferable ticket from one who had partially used it, *Langdon v. Howells*, 4 Q. B. D. 337. As to refusing to show ticket without intent to defraud, *Saunders v. South-Eastern Railway Company*, 5 Q. B. D. 456. As to illegality of by-law under 8 & 9 Vict. c. 20, ss. 103, 109, *Dyson v. London and North-Western Railway Company*, 7 Q. B. D. 32. Sec. 103 is superseded by s. 5 of the Regulation of Railways Act 1889 (52 & 53 Vict. c. 57), and partially repealed by the Statute Law Revision Act 1892 (55 & 56 Vict. c. 19). See *Huffam v. North Staffordshire Railway Company* (1894), 2 Q. B. 821. The cases are collected and the law discussed in an article on "Railway Tickets" in the *Law Journal* for August 11, 1894. In *Fulton v. Grand Trunk Railway Company*, 17 Upp. Can. Q. B. 428, plaintiff got upon a train without a ticket, and when asked for his fare declined paying it, "as he had not made up his mind how far he would go." The conductor told him he must decide, and on his declining again on the same ground, stopped the train and put him off. The plaintiff then tendered the conductor a 20 dollar goldpiece, telling him to take his fare, 1.35 dollar. The Court held that the plaintiff had refused to pay his fare within the meaning of an Act enacting that "passengers refusing to pay their fares may by the conductor of the train and the servants of the company be with their baggage put out of the cars, using no unnecessary force, at the usual stopping-place or near any dwelling-house, as the conductor shall elect, first stopping the train." In the United States it has been decided, as a point of law, that a person purchasing a railway ticket has a right to rely upon the ticket-clerk giving him a proper ticket, and that in the absence of special circumstances there is no duty on the purchaser to examine the same, so that in the event of mistake happening, the railway authorities are not discharged by alleged negligence of the passenger: *Georgia Railroad, &c. Company v. Dougherty*, 22 Am. St. R. 499. In England, the same result would practically be attained by leaving to the jury the question whether, considering the relative positions of the ticket-clerk and the proposed passenger, the latter had so acted as to preclude himself from alleging the act of the ticket-clerk, with probably a direction that the *onus* of proof lay on the railway company.

Railway Company's duty differs in respect of trespassers and passengers.

Suggested
criterion.

way in which a passenger may be discriminated from a trespasser probably is, to consider whether any act or declaration of the railway company or their servants is shewn affecting them with knowledge that the person alleged by them to be a trespasser was travelling in their train, and that they acquiesced in his doing so, or, at least, did not take immediate measures to prevent his continuing to do so; or whether there are any circumstances in the case from which a consent may be implied as, in the case of travelling without a ticket, the opening of the gate to let the traveller pass without asking for a sight of the ticket; in the case of getting into a wrong train, any circumstances of ambiguity whereby the passenger may have been misled; in the case of travelling beyond the distance covered by the traveller's ticket, a practice of paying excess fares at the station of his arrival;¹ in all cases, any conduct, whether general or special, by which the conclusion can be drawn that the company waive the tort and elect to resort to other remedies to secure their rights.²

Watkins v.
Great Western
Railway
Company.

Thus, in *Watkins v. Great Western Railway Company*,³ a mother was going with her daughter, an intending passenger, to a train, when she knocked her head against an obstruction. Denman, J., was of opinion that acquiescence by the company in such accompaniment would be enough to put the licensee on the same level as to rights with a passenger.⁴

Shaw, C.J.,
in Commonwealth
v. Power.

The position of the mother in the case before Denman, J., is illustrated by what is pointed out by Shaw, C.J., in *Commonwealth v. Power*:⁵ that persons other than passengers *prima facie* have the right to enter the dépôt of a railway company, as others besides guests may go into hotels without making

¹ Cp. per Lord President M'Neill, *Hamilton v. Caledonian Railway Company*, 19 Dunlop 457, at 461.

² See *London and Brighton Railway Company v. Watson*, 4 C. P. Div. 118, distinguished in *Great Northern Railway Company v. Winder* (1892), 2 Q. B. 595. A passenger who enters a sleeping-car for the purpose of asking permission to wash his hands, was held not a trespasser, in *Williams v. Pullman Palace Car Company*, 40 La. Ann. 417, 8 Am. St. R. 538; and so, according to *Thorpe v. New York Central, &c. Railway Company*, 76 N. Y. 402, is a passenger unable to find a seat in the ordinary car, who enters a sleeping-car and takes a seat there.

³ 37 L. T. (N. S.) 193. In *Little Rock, &c. Railway Company v. Lawton*, 29 Am. St. R. 48, a railway company was held to have a duty to a person acting as escort to a female passenger and little child though the escort is not a passenger, and to stop a reasonable time to let her alight from the car; and a notice to trespassers does not apply to such a person.

⁴ This may have been right on the facts of the case, but in *Redigan v. Boston and Maine Railroad Company*, 155 Mass. 44, 31 Am. St. R. 520, the Court held plaintiff disentitled to recover against a railway company for leaving open a trap-door in the platform of a railway station, down which plaintiff fell while taking a short cut through the railway station on his own business. The breach of duty alleged was that he was not prevented going by the defendants. The principle of this decision is that asserted in *Batchelor v. Fortescue*, 11 Q. B. Div. 474. *Ante*, 528.

⁵ 48 Mass. 596, at 602; *State v. Steele*, 19 Am. St. R. 573.

themselves trespassers, because in both instances there is an implied licence given to the public to enter, but such licences in their nature are revocable,¹ except in the one case as to passengers, and in the other as to guests, who have the right to enter the train, ticket office, or hotel, as the case may be, if they are sober, orderly and able to pay for transportation or fare.

In *Hamilton v. Caledonian Railway Company*,² the by-laws of the Caledonian Railway provided that persons travelling without a ticket would be charged excess fare according to a schedule furnished to the station-masters. A person having business at various stations along the line sometimes travelled without a ticket, though not with intention to avoid payment of his fare. On one occasion, while so travelling without a ticket he was injured and brought an action to recover damages in respect of his injuries. The company objected that he was not a passenger. The Court, however, through Lord President M'Neill, expressed the opinion³ "that a person may be a passenger in the sense of the Act,⁴ although he may not have a ticket." "He may be a passenger though without a ticket if he has been in use so to travel, and the officers of the company know that he had so travelled." This expression is probably too narrow; if the officers of the company know that he is so travelling, he would, it would seem, be entitled to treatment as a passenger, even though he had never travelled thus before. The determining factor in the case would appear to be *bona fides* on the traveller's part; and not even necessarily knowledge on the part of the company's officers.

The Court of Appeal were of opinion in *Thatcher v. Great Western Railway Company*,⁵ that it is a common practice known to railway companies for one person to come to a railway station to see another off. That being so, Lord Esher, M.R., thus answers the question, What duty has the railway company to those persons? "No doubt in strict logic they had not the same amount of duty to them as they had to persons who paid them money in consideration of being carried as passengers. But, so far as regarded the taking of means for providing for personal safety, it was impossible to measure the difference between their duty to the one class of persons and their duty to the other. In short, it was their duty to take reasonable care with regard to both. The defendants, therefore, owed the plaintiff the duty to take reasonable care not to do anything to endanger his personal safety. . . . The allowing the door of

¹ *Cp. Weaver v. Bush*, 8 T. R. 78.

² 19 Dunlop, at 461.

³ 10 Times L. R. 13 (C. A.).

⁴ (1857), 19 Dunlop 457.

⁵ 8 & 9 Vict. c. 83.

the guard's van to remain open in such a way that it swept the plaintiff down while he was standing on the platform was clearly a failure on the part of the defendants' servants to take such reasonable care as it was their duty to take."

Rounds v. Delaware Railroad Company.

Of course the fact of a person being a trespasser does not authorize brutal conduct or wilful injury of any kind; as was said in *Rounds v. Delaware Railroad Company*¹—a case where a boy trespassed on a railway car: "The fact that the plaintiff was a trespasser on the cars is not a defence. The lad did not forfeit his life, or subject himself to the loss of his limbs, because he was wrongfully on the car. The defendant owed him no duty of care by reason of any special relation assumed or existing between the company and him, but he was entitled to be protected against unnecessary injury by the defendant or its servants in exercising the right of removing him, and especially from the unnecessary and unjustifiable act of the brakeman by which his life was put in peril, and which resulted in his losing his limb." The boy was kicked off the car.

Statutory passengers.

Where the carrier has undertaken, or is compelled by law, to carry a passenger, the consideration of whether the passenger paid or was carried free is altogether irrelevant.

Collett v. London and North-Western Railway Company.

In *Collett v. London and North-Western Railway Company*,² a post-office officer was injured while travelling on the defendants' line in the execution of postal duty, which by statute he was authorized to do free of charge. The Court of Queen's Bench held the company liable, Lord Campbell, C.J., saying:³ "That it was the duty of the company to use due and proper care and skill in conveying is admitted. That duty does not arise in respect of any contract between the company and the persons conveyed by them, but it is one which the law imposes; if they are bound to carry, they are bound to carry safely; it is not sufficient for them to bring merely the dead body to the end of the journey."⁴

Passengers by invitation.

Philadelphia and Reading Railroad Company v. Derby.

The year following the same rule was held by the Supreme Court of the United States to be law in *Philadelphia and Reading Railroad Company v. Derby*.⁵ The language of the judgment is

¹ 64 N. Y. 129, at 138. See *Delaney v. Dublin United Tramways Company, Limited*, 30 L. R. Ir. 725. This case is commented on, *ante*, 165.

² (1851) 16 Q. B. 984.

³ *J. c.* at 989.

⁴ *Ross v. Hill*, 2 C. B. 877. In *Grand Trunk, &c. Railroad Company v. Richardson*, 91 U. S. (1 Otto) 454, at 471, *Bains v. Railroad Company*, 42 Vt. 380, is approved, where it is said "that a railway company in the discharge of its duties, and in the exercise of its right to protect its property from injury to which it is exposed by the unlawful act or neglect of another, is bound to use ordinary care to avoid injury even to a trespasser." For what is signified by "ordinary care," see *ante* 86 and 911. See *Seybolt v. New York Railroad Company*, 95 N. Y. 562, 47 Am. R. 75, see note at 75; *Barton v. Thompson*, 26 Am. R. 131; *Welch v. Jagenheimer*, 41 Am. R. 77.

⁵ 14 How. (U. S.) 468. In *Steamboat New World Company v. King*, 16 How

most comprehensive :¹ "If one be lawfully on the street or highway, and another's servant carelessly drives a stage or carriage against him, and injures his property or person, it is no answer to an action against the master for such injury, either that the plaintiff was riding for pleasure, or that he was a stockholder in the road, or that he had not paid his toll, or that he was the guest of the defendant, or riding in a carriage borrowed from him, or that the defendant was the friend, benefactor, or brother of the plaintiff." "If the plaintiff was lawfully on the road at the time of the collision, the Court were right in instructing the jury that none of the antecedent circumstances or accidents of his situation could affect his right to recover." The plaintiff was a stockholder in the company, riding by invitation of the president, paying no fare, and not in the usual passenger cars.

The American law² is settled on the basis that common carriers have public duties to discharge, from which they are not able to exonerate themselves even with the consent of their customers ; and that special contracts made by them with their customers are good and valid to the extent only of excusing them, for example, for all losses happening by accident without any negligence or fraud on their part ; but that an exemption from liability for negligence is held repugnant to the law of their constitution and the public good, and consequently inoperative.

American law based on the consideration that carriers have public duties to discharge.

These principles are applied both to carriers of goods and carriers of passengers, and especially to the latter. Thus, where a drover travelling with cattle had signed an agreement "to take all risk of injury to them and of personal injury to himself," and was injured through the negligence of the company's servants, the Supreme Court of the United States held the stipulation void, and that he was entitled to recover for his injuries from the company.³

Exception of company's negligence void.

(U. S.) 469, at 474, Grier, J., alluding to the decision, says : "We desire to be understood to reaffirm that doctrine, as resting not only on public policy, but on sound principles of law."

¹ 14 How. (U. S.) at 485.

² A valuable and interesting judgment in *Pennsylvania Railroad Company v. Henderson*, 51 Pa. St. 315, sets out the mature view of American lawyers, with some forcible considerations that should be regarded in weighing certain dissentient opinions.

³ *Railroad Company v. Lockwood* (1873), 17 Wall. (U. S.) 357 ; *Hart v. Pennsylvania Railroad Company*, 112 U. S. (5 Davis) 331. It is there laid down that the proper test to be applied to every limitation of the common law liability of a carrier, is its just and reasonable character. "In Great Britain a statute directs this test to be applied by the courts. The same rule is the proper one to be applied in this country in the absence of any statute," at 342. For the responsibility of a railway company to strangers, *Reary v. Louisville, &c. Railway Company*, 40 La. Ann. 32, 8 Am. St. R. 497 ; but where the drover gets in an improper place, see *Little Rock Railway v. Miles*, 48 Am. B. R. 10, and note at 15. In England an agreement of the kind referred to in the text is invalid when made with an infant, *Flower v. London and North Western Railway Company* (1894), 2 Q. B. 65. *Ante*, 874, n. ¹.

Contradictory
decision in
England.
M'Cawley v.
Furness
Railway
Company.

Judgment of
Blackburn, J.

The year previously to this decision the Queen's Bench decided a very similar case in the opposite way. *M'Cawley v. Furness Railway Company*¹ was decided on demurrer. The plaintiff, a cattle drover, who travelled on defendants' line as a drover with cattle, declared on a contract to be safely and securely carried. The defendants pleaded a contract "to carry under a free pass" "whereby it was, amongst other things, provided that any drover accompanying cattle" "should travel at his own risk." The replication set up "gross and wilful negligence and mismanagement of defendants." To this there was a demurrer. The point of law was thus cleared of all ambiguities and presented barely to a very strong Court,² who decided that the plaintiff could not recover. The judgment of Blackburn, J., is as follows: "The duty of a carrier of passengers is to take reasonable care of a passenger, so as not to expose him to danger, and if they negligently expose him to danger, and he is killed, they might be guilty of manslaughter, and they would certainly be liable to the relatives of the deceased in damages. But here the passenger was carried under special terms; that agreement would not take away any liability that might be incurred as to criminal proceedings, but it regulates the right of the plaintiff to recover damages. The plea states that it was agreed that the plaintiff, being a drover travelling with cattle, should travel at his own risk; that is, he takes his chance, and, as far as having a right to recover damages, he shall not bring an action against the company for anything that may happen in the course of the carriage. It would, of course, be quite a different thing were an action brought for an independent wrong, such as an assault or false imprisonment. Negligence in almost all instances would be the act of the company's servants, and 'at his own risk' would of course exclude that, and gross negligence would be within the terms of the agreement; as to wilful, I am at a loss to say what that means; but any negligence for which the company would be liable (confined, as I have said, to the journey—and it is so confined by the declaration) is excluded by the agreement."³

¹ (1872) L. R. 8 Q. B. 57. In *Duff v. Great Northern Railway Company*, 4 L. R. Ir. 178, the drover signed the conditions. As to the position of a passenger, taking a ticket by a goods train with a condition that the company should be freed from responsibility, and who was injured through the carriage in which he was carried stopping short of the platform, see *Johnson v. Great Southern and Western Railway Company*, Ir. R. 9 C. L. 108.

² Cockburn, C.J., Blackburn, Mellor, and Quain, JJ.

³ As to what is necessary in order to except misconduct or default of the carrier's own servants, see per Bowen, L.J., *Steinman & Company v. Angier Line* (1891), 1 Q. B. 619, at 623.

In *Gallin v. London and North-Western Railway Company*,¹ the principle of this decision was held applicable to negligence incidental to the actual conveyance, and arising not from the circumstances of the transit but from defect in arrangements made for the purpose of conducing to its effective fulfilment. There a drover, carried on terms identical with those we have already seen held good in *M'Cawley's* case, got out of the van in which he was being carried on a stoppage occurring, and, in walking from the spot where the train stopped along the railway to the passenger station, fell over a bridge into a river and was injured. He was held not entitled to recover, since the terms on which he was travelling "at his own risk" covered not only the direct, but the incidental perils of the transit. Mellor, J., was of opinion that the words "travel at his own risk include as in *Hodgman v. West, Midland Railway Company*,² all the incidents connected with the journey." "All those risks which result or arise during the transit, and until the transit is actually at an end, are intended to be guarded against, and are actually guarded against, by these words."³

Gallin v. London and North-Western Railway Company.

Even assuming that the plaintiff in this case was in the position of an ordinary paying passenger, it is not at all clear that his position would have been improved. For, as is said by Bramwell, B., in *Siner v. Great Western Railway Company*:⁴ "Suppose it [the train] had stopped just against the parapet of a bridge, . . . can there be any doubt that it would have been the duty of the passengers to stay in, and that they would have got out at their peril?"

Opinion of Bramwell, B.

It has sometimes been urged that the duty of a company to their passengers may vary in proportion to the amount of care they pay for; like goods carried under special contracts where the obligation of the company may materially differ as the charge made is usual or reduced. This, however, has been decided not to be so. "Life and limb are as valuable," it was said in one case,⁵ "and there is the same right to safety in the caboose as in

Duties to passengers irrespective of class.

Indianapolis, &c. Railroad Company v. Horst.

¹ L. R. 10 Q. B. 212.

² 5 B. & S. 173, in Ex. Ch. 6 B. & S. 560, the case of a horse injured before fully received by the carrier.

³ On the authority of these cases the Victorian case of *M'Donald v. Victorian Railway Commissioners*, 13 Vict. L. R. 399, was decided.

⁴ L. R. 3 Ex. 150, at 154, in Ex. Ch. L. R. 4 Ex. 117. Cp. *Praeger v. Bristol and Exeter Railway Company*, 24 L. T. (N. S.) 105, distinguishing *Siner's* case on two grounds—first, because there was a clear invitation; secondly, because the danger was not apparent; *Cockle v. London and South-Eastern Railway Company*, L. R. 7 C. P. 321.

⁵ *Indianapolis, &c. Railroad Company v. Horst*, 93 U. S. (3 Otto) 291, at 296. In *Hamilton v. Caledonian Railway Company*, 19 Dunlop 457, at 459, Inglis, Dean of the Faculty, in arguing, says: "By its regulations the Company refused to carry a drunken person, but suppose he was smuggled into the train, would the Company be

the palace car. . . . The same considerations apply to freight trains; the same dangers are common to both." The test to be applied is thus stated in the same case. "The standard of duty should be according to the consequences that may ensue from carelessness. The rule of law has its foundation deep in public policy." "The highest degree of carefulness and diligence is expressly exacted."¹

Great Western
Railway
Company v.
Blake.

Bristol and Exeter Railway Company v. Collins² decided, as we have already seen, that the terms of a contract for the carriage of goods made with one company at the outset of the journey *prima facie* held good for the whole journey. In Great Western Railway Company v. Blake,³ in the Exchequer Chamber, the contracting company was held liable to the passenger for injury arising as well on their own line as during the passage over another line. The injury arose from the condition of a part of the line over which the appellants had no direct control, since it was part of an auxiliary line, and under the management of an auxiliary company. A point having been made of this gave occasion to Cockburn, C.J., to lay stress on the distinction between railway companies and stage-coach proprietors. "This," said he,⁴ "is not like the case of a stage-coach proprietor, because the road is not in his hands, and he has no means of securing its proper condition. When the contract is entered into, the road would be in a certain condition without anything being required to be done on the part of the coach proprietor to keep it in a safe condition. railway companies ought at least to use due and reasonable care to keep the line over which they contract to carry passengers in a safe condition. There is no doubt that is the obligation which attaches to a railway company who undertake to convey passengers through the whole distance on their line; and if, by arrangement with another company, they convey passengers over the whole or part of another line, the same obligation attaches, and they make the other company their agent, and on their part they undertake that the other company shall keep their line in a proper condition."

Remarks of
Cockburn, C.J.

Converse case
in Hall v.
North-Eastern
Railway
Company.

The converse case occurred in Hall v. North-Eastern Railway Company,⁵ and was complicated by the fact that the plaintiff was a

responsible for his safety?" His answer to his own question is: "He was truly in the position of a person getting up behind a carriage and getting his leg broken by an accident." To this Lord President M'Neill says: "Does your principle of law apply to a person having a third class ticket going into a first class carriage? Inglis, D.F., I am unable to answer that. There may be a difficulty about that."

¹ Railroad Company v. Lockwood, 17 Wall. (U. S.) 357, at 358. The English rule is the same: see per Bramwell, L.J., Phillips v. London and South-Western Railway Company, 5 C. P. D. 280, at 288.

² 7 H. L. C. at 194. *Ante*, 1130.

⁴ L. c. at 992.

³ 7 H. & N. 987.

⁵ L. R. 10 Q. B. 437.

drover in charge of sheep, and travelling "at my own risk without paying any fare." He was injured on an auxiliary line, and brought his action against the injuring company, and not against the company with whom his contract was and an action against whom would have been within *Great Western Railway Company v. Blake*.¹ The point raised in the present case was expressly reserved there; Cockburn, C.J., saying,² "it is unnecessary to say" whether or not such a claim could be sustained. The Queen's Bench, however, decided that the true construction of the contract was, "In consideration of my being carried the whole way free of charge I agree that I shall be travelling the whole way at my own risk;" consequently the auxiliary company were as much protected from the effects of their negligence as the principal and contracting company; even though "the plaintiff did not sign the ticket, and he was not asked to do so,"³ for "he travelled without paying any fare, and he must be taken to be in the same position as if he had signed it."

Point expressly reserved by Cockburn, J., in *Great Western Railway Company v. Blake*.

*Great Western Railway Company v. Blake*⁴ was followed without discussion in *Buxton v. North-Eastern Railway Company*.⁵ In *Thomas v. Rhymney Railway Company*⁶ however, a distinction was sought to be established between those cases and the case before the Court, on the ground that in the earlier case the companies had an agreement for the sharing of profits, and so became the agents the one of the other; while in the present case, where the defendant company merely had running powers over the line of another company, by whose negligence, and without negligence on the part of the defendants, the accident happened, the relation was only that of different stage-coach proprietors at common law. The decision of the Exchequer Chamber was⁷ that "where a railway company issues a ticket for a journey in the course of which the train which conveys the passenger has to pass along a portion of a line of railway belonging to another company (whether it be under running powers, or whether it be under any particular contract for a participation in profits or otherwise), the contract between the railway company and the traveller to whom such ticket is issued is, upon every principle of law, a contract not only that they will not themselves be guilty of any negligence, but that the passenger shall be carried with due and reasonable care along the whole line from one end of the journey to the other."

Buxton v. North-Eastern Railway Company.
Thomas v. Rhymney Railway Company.

¹ 7 H. & N. 987.

² L. c. at 993.

³ L. R. 10 Q. B., per Blackburn, J., at 442.

⁴ L. c. at 441.

⁵ 7 H. & N. 987.

⁶ L. R. 3 Q. B. 549.

⁷ L. R. 5 Q. B. 226, in Ex. Ch. L. R. 6 Q. B. 266.

⁸ Per Kelly, C.B., L. R. 6 Q. B. at 273.

Daniel v.
Metropolitan
Railway
Company.

In the House of Lords, in *Daniel v. Metropolitan Railway Company*,¹ the Lord Chancellor (Hatherley), alluding to the duty of a railway company conveying passengers over a line of part of which the company is not owner, said: "They [the company] would be obliged to see that their own line of road was in perfect order, and they would be responsible for any negligence which occurred on the other line of road, whether under their control or not, if they have contracted to carry passengers over that particular piece of road; but they would not be answerable, as I apprehend, for any mischief occasioned by any matter extraneous altogether to the work in which they were engaged, and as to which they had no reasonable ground for supposing that ordinary and proper care had not been taken by those persons whose duty it was to take such care."

Wright v.
Midland
Railway
Company.

An illustration of this exception arising from collateral negligence, and not from anything incident to the carriage, occurs in *Wright v. Midland Railway Company*.² At the junction of the Midland Company's line with the North-Western's was a signal-box in charge of a servant of the defendants, who set the signal in favour of the defendants' train so that it could proceed over a portion of the line over which both companies had running powers. While on this line, it was run into by a train of the North-Western's, which was driven by persons who negligently disregarded the signal. The plaintiff was injured, brought his action, and was held, by the Court of Exchequer, not entitled to recover; since the accident did not arise from any negligent act which made the road unsafe, nor the carriage or engine unsafe, or the signals wrong, but from something done outside the carrying, and which was really an independent trespass. The case, in fact, was like that which was repeatedly alluded to, in *Daniel v. Metropolitan Railway Company*,³ during its progress through the various courts, where a waggon heavily laden with goods, "piled up to that enormous height to which we often see waggons piled up in this metropolis,"⁴ is so improperly packed that a bale of goods falls off a stage-coach, and kills or injures a passenger. In reference to that case, the Lord Chancellor (Hatherley) said: "I apprehend that all that is to be done by those who carry passengers for hire is that they are bound to see that everything under their own

Case put in
Daniel v.
Metropolitan
Railway
Company.

Considered
by the Lord
Chancellor
(Hatherley).

¹ L. R. 5 H. L. 45, at 55, referring to *Birkett v. Whitehaven Junction Railway Company*, 4 H. & N. 730, where switches on the line over which the defendants had running powers got out of order and there was neglect of precautions by the defendants.

² L. R. 8 Ex. 137.

³ L. R. 5 H. L. 45.

⁴ L. c. per Lord Hatherley, C., at 54.

⁵ L. c. at 55.

control is in full and complete and proper order. They are bound to see, also, if there be a certain and definite risk as to which they have any knowledge or can reasonably be supposed to have any knowledge, that is sufficiently guarded against." In Wright's case they had done all this, and the accident was due to a pure tort of some one over whom they had no control; just as if a ditch had been dug across the line by a wrongdoer. The cases discussed.

Indeed, this is a case expressly excepted by Kelly, C.B., in his judgment in *Thomas v. Rhymney Railway Company*, where he says: "We must not be considered as holding that, where the mischief complained of has arisen from the act of a stranger, such as would arise from any mischievous person leaving a log of wood across the railway, or any other act which might endanger a railway train passing along, an action would be maintainable against the railway company, because in that case there would not be any direct or indirect breach of duty or breach of contract on their part." Limitation on liability expressed by Kelly, C.B., in *Thomas v. Rhymney Railway Company*.

Breach of duty or breach of contract, then, is the test that is to be applied; and it is not the duty of a railway company to take precautions against possible negligence on the part of persons who are not in their employment nor under their control in the discharge of duties which, if rightly performed, will not affect them." Test of liability.

In the cases we have been considering no question has been raised of the fact of the person travelling with a "free pass" being other than cognizant of the terms under which he is conveyed. An important question, however, arises of how far a passenger is bound by conditions not actually communicated to him, or the effect of which he has not troubled himself to master. Most of the decisions on this point turn on the terms on which luggage is received or dealt with; but the principle on which conditions attached to a ticket are held valid may not inconveniently be generally treated in this place. Question of how far a person travelling on a line of railway is to be held bound by conditions not actually communicated to him.

The earliest case necessary particularly to be noticed is *Van Toll v. South-Eastern Railway Company*.¹ A bag was deposited at a cloak-room, and a ticket given in exchange, containing the conditions of the deposit. The ticket was produced when the depositor went to demand the bag, which had, however, previously been delivered to another person. In the Court of Common Pleas, on motion, the judgment was for the defendants, *Van Toll v. South-Eastern Railway Company*.

¹ L. R. 6 Q. B. 266 at 274. As to the American law, see *Flaherty v. Minneapolis, &c. Railway Company*, 12 Am. St. R. 654; also *Railroad Company v. Barron*, 5 Wall. (U. S.) 90, and the cases there referred to.

² *Daniel v. Metropolitan Railway Company*, L. R. 5 H. L. 45.

³ (1862) 12 C. B. N. S. 75; cp. *Stallard v. Great Western Railway Company*, 2 B. & S. 419.

because, the facts were "that the plaintiff knew that the deposit was to be made according to some terms imposed by the defendants, because she conformed to some of them, not upon inquiries then made, but as having previous knowledge; that the defendants had used all reasonable means to make known to the depositors, and among them to the plaintiff, the terms on which they received deposits; and that the plaintiff knew there were special terms, and either knew what they were, or, with the means of knowing what they were, chose to make the deposit without ascertaining them—either assenting to them on the assumption that they were reasonable, or being willing to be bound by them whatever they might be." It followed "that the plaintiff does not prove that the deposit was made on the terms of absolute liability stated in the declaration."

Stewart v.
London and
North-
Western
Railway
Company.

The next case, *Stewart v. London and North-Western Railway Company*,² was decided on the broad ground that "a person must be presumed to know what he has the means of knowing."³ Luggage was not carried by an excursion train, tickets for which were issued at one-fourth the ordinary fare, and on which was printed, "Tickets as per bill," and on the back, "This ticket is issued subject to the conditions contained in the company's time and excursion bills;"⁴ one of which conditions was luggage under 60 lb. free at passenger's own risk.

Lewis v.
M'Kee.

Dilemma
propounded
by Willes, J.

*Lewis v. M'Kee*⁵ raised a question of discharge of liability by reason of an indorsement on a bill of lading made by the party to be charged, and unseen and unassented to by the other party, and is unimportant to the present point, save for a dilemma propounded by Willes, J., in giving judgment: "If one person seeks to impose on another a liability by contract, but chooses to abstain from reading the terms of the document in which the liability is sought to be expressed, he is in this dilemma. Either he has chosen to accept the terms without taking the trouble of informing himself what they are; or if not reading, he did not assent to the terms proposed, then no action lies, because one side has intended one thing, and the other a different thing, and the transaction is vitiated by mutual error."⁶ This dilemma, however, is only effectual in those cases where there is no duty independent of the contract; for where there is a duty, failing the communication of the terms of the contract, the obligation

Considered.

¹ *L. c.* per Erle, C.J. at 83.

² (1864) 3 H. & C. 135.

⁴ *L. c.* at 136.

⁵ *L. c.* at 61.

³ *L. c.* per Pollock, C.B., at 138.

⁶ *L. R.* 4 Ex. 58.

⁷ That is, with reference to the special terms; for some liability—*e.g.*, that of an involuntary bailee—there must be.

implied by law must be observed. The dilemma also assumes, on the hypothesis of an acceptance of terms without an ascertaining of their purport, that any communication to the person to be bound is sufficient to bind him if he fails to shew circumstances of exoneration. Now, it is precisely on this point that the subsequent controversy turns. In the case where there is a duty to receive, it is obvious that more should be required to vary the terms the law implies than the fact that the person to be exonerated has so willed ; for which the very case of *Lewis v. M'Kee*¹ is an authority.

*Zunz v. South-Eastern Railway Company*² is important as containing a distinct enunciation of the proposition involved in *Lewis v. M'Kee*. Plaintiff took a passenger ticket from the defendant company, from London to Paris, on which was printed :³ " The South-Eastern Railway Company is not responsible for loss or detention of, or injury to, luggage of the passenger travelling by this through ticket, except while the passenger is travelling by the South-Eastern Railway Company's trains or boats." Plaintiff's luggage was lost on a French railway. In the Queen's Bench Cockburn, C.J.,⁴ said : " We are bound on the authorities to hold that when a man takes a ticket with conditions on it, he must be presumed to know the contents of it and must be bound by them."

Zunz v. South-Eastern Railway Company.

Cockburn, C.J., considered that the passenger is presumed to know the conditions on the ticket.
Henderson v. Stevenson.

The subsequent case of *Henderson v. Stevenson*⁵ considerably qualifies this as an universal proposition, and, though a Scotch case, is, as pointed out by Blackburn, J., in *Harris v. Great Western Railway Company*,⁶ not only an authority, but a decision " on a subject in respect of which the law of Scotland and the law of England are one and the same." A ticket having on its face only the words " Dublin and Whitehaven " was given to a passenger, who, without looking at it, paid for it, and went on board the vessel on which he had taken his passage. Having lost his luggage, he brought an action against the company, who referred to a condition on the back of the ticket by which they intimated they would not undertake liability in a case like the plaintiff's.

The opinion of Lord Cairns, C., lays great stress on the circumstances, first, that in point of fact the plaintiff did not read the ticket, and did not know what was written on the back ; and, secondly, that there was nothing on the face of the ticket referring to the back. " Can it be held," he said,⁷ " that when a

Opinion of Lord Cairns, C.

¹ L. R. 4 Ex. 58.

² L. R. 4 Q. B. 539.

³ L. c. at 541.

⁴ L. c. at 544.

⁵ (1875) L. R. 2 H. L. (Sc.) 470 ; cp. *Great Western Railway Company v. Goodman*, 12 C. B. 313.

⁶ 1 Q. B. D. 515, at 528.

⁷ L. c. at 476.

person is entering into a contract containing terms which *de facto* he does not know, and as to which he has received no notice, that he ought to inform himself upon them? My Lords, it appears to me to be impossible that that can be held." This ground of decision seems absolutely irreconcilable with the *dictum* of Cockburn, C.J., in *Zunz v. South-Eastern Railway Company*.¹ There he held that the fact that a man takes a ticket with conditions on it raises a presumption that he knows the contents, and therefore must be bound by them. In *Henderson v. Stevenson* the Lord Chancellor² is of opinion that "it would be extremely dangerous, not merely with regard to contracts of this description, but with regard to all contracts, if it were to be held that a document complete upon the face of it can be exhibited as between two contracting parties, and without any knowledge of anything beside, from the mere circumstance that upon the back of that document there is something else printed, which has not actually been brought to and has not come to the notice of one of the contracting parties, that contracting party is to be held to have assented to that which he has not seen, of which he knows nothing, and which is not in any way ostensibly connected with that which is printed or written upon the face of the contract presented to him."

Lord Chelmsford's view even more thorough-going.

Also Lord Hatherley's.

Some of the other Law Lords go much further than this; thus, Lord Chelmsford said:³ "I think that such an exclusion of liability for negligence cannot be established without very clear evidence of the notice having been brought to the knowledge of the passenger and of his having expressly assented to it. The mere delivery of a ticket with the conditions indorsed upon it is very far, in my opinion, from conclusively binding the passenger." And Lord Hatherley:⁴ "I agree with the observation that was made by my noble and learned friend,⁵ that the money having been paid, and the ticket having been taken up, a contract was completed upon the ordinary terms of conveyance for himself and his luggage, unless it can be made out that he entered into a special contract to the contrary. A ticket is in reality nothing more than a receipt for the money which has been paid."⁶

¹ L. R. 4 Q. B. 539.

² L. R. 2 H. L. (Sc.) at 475. *Johnson v. Great Southern and Western Railway Company*, Ir. R. 9 C. L. 108, was decided the year before *Henderson v. Stevenson*, with which it seems identical as to its facts, though inconsistent in the conclusion arrived at.

³ L. c. at 477.

⁵ Lord Chelmsford.

⁴ L. c. at 478.

⁶ "This certainly is no part of the decision of the House, and, indeed, seems to be contrary to the view taken by the Lord Chancellor": per Blackburn, J., *Harris v. Great Western Railway Company*, 1 Q. B. D. 515, at 532. In *Lewis v. New York*

These observations, however, it was pointed out by Blackburn, J., in *Harris v. Great Western Railway Company*,¹ "are expressions used by the different Lords which seem to express opinions, which were not, I think, part of the decision of the case then before them, and which are not, in my opinion, correct when applied to the case we have before us of a ticket given on the deposit of goods with a company, who do not hold themselves forth as general receivers of goods to be kept for hire, but let it be known that though they do not, and will not, as a general rule, receive or keep such goods, they will take them if the passenger brings them to a particular office, and there receives a ticket on the production of which the goods will be given up to the person producing it." In that case, in the opinion of Blackburn, J., in which the other members of the Court of Queen's Bench agreed, the rule applicable is—"If the bailor and bailee agree that the goods shall be deposited on other terms than those implied by law, the duty of the bailee, and consequently his responsibility, is determined by the terms on which both parties have agreed. And it is clear law that where there is a writing, into which the terms of any agreement are reduced, the terms are to be regulated by that writing. And though one of the parties may not have read the writing, yet, in general, he is bound to the other by those terms."²

Consideration by Blackburn, J., of the effect of the foregoing opinions.

Rule stated by Blackburn, J., in *Harris v. Great Western Railway Company*.

In giving judgment in *Parker v. South-Eastern Railway Company*,³ Mellish, L.J., expressed his opinion⁴ that *Harris v. Great Western Railway Company* was rightly decided; because the plaintiff there admitted that he believed there were some conditions on the ticket; and distinguished the case from *Henderson v. Stevenson*,⁵ which he held to be a "conclusive authority" that where a person does not know that there is writing on the back of a ticket he is not bound by what is contained in the writing.

Approved in the Court of Appeal by Mellish, L.J.

In *Parker v. South-Eastern Railway Company*⁶ and in *Gabell v.*

Sleeping Car Company, 143 Mass. 267, a railway ticket is described "as only a symbol of the contract." By The Regulation of Railways Act 1889 (52 & 53 Vict. c. 57), s. 5: (1) any passenger is to deliver up his ticket or pay his fare at the request of any officer or servant of the company, or to give his name and address; (2) if a passenger fails to deliver up his ticket or pay his fare and refuses his name and address any officer or servant of the company may detain him. See *Mulkern v. Metropolitan Railway Company*, 8 Times L. R. 232; *Brotherton v. Metropolitan and District Joint Committee*, 9 Times L. R. 645 (C. A.).

¹ (1876) 1 Q. B. D. 515, at 529.

² 1 Q. B. D. at 530. Cp. *Skipwith v. Great Western Railway Company*, 4 Times L. R. 589, the case of loss of a bag from the cloak-room of a railway station, where the Court said: "The company were not obliged to take charge of parcels in a cloak-room; they could therefore make what conditions they chose."

³ 2 C. P. Div. 416.

⁴ L. c. at 421.

⁵ L. R. 2 H. L. (Sc.) 470.

⁶ 2 C. P. D. 416. *Bate v. Canadian Pacific Railroad Company*, 15 Ont. App. 388.

View of
Mellish, L.J.

South-Eastern Railway Company, in which joint judgments were given, the plaintiffs in each case admitted that they knew there was writing on the back of the tickets they respectively received, though they swore that they did not read it, and, further, that they did not know or believe that they contained conditions. In these circumstances, Mellish, L.J., overruling the Common Pleas Division¹ (where the case was decided a month previously to the argument of *Harris v. Great Western Railway Company* in the Queen's Bench Division²), said:³ "I am of opinion that we cannot lay down, as a matter of law, either that the plaintiff was bound or that he was not bound by the conditions printed on the ticket, from the mere fact that he knew there was writing on the ticket, but did not know that the writing contained conditions. I think there may be cases in which a paper containing writing is delivered by one party to another in the course of a business transaction where it would be quite reasonable that the party receiving it should assume that the writing contained in it no condition, and should put it in his pocket unread." The learned judge then gives the instance of a person receiving a toll-ticket, when driving through a turnpike-gate, as one where the receiver might reasonably put it in his pocket unread; and that of a bill of lading as one where the receiver would be bound, whether he read it or not.

As to the effect
of a railway
ticket contain-
ing conditions.

He then discusses the case of a railway ticket where he could see there was some writing on it.⁴ "The railway company must, however, take mankind as they find them, and, if what they do is sufficient to inform people in general that the ticket contains conditions, I think that a particular plaintiff ought not to be in a better position than other persons on account of his exceptional ignorance or stupidity or carelessness. But if what the railway company do is not sufficient to convey to the minds of people in general that the ticket contains conditions, then they have received goods on deposit without obtaining the consent of the persons depositing them to the conditions limiting their liability. I am of opinion, therefore, that the proper direction to leave to the jury in these cases is, that if the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions; that if he knew there was writing, and knew or believed that the writing contained conditions, then he is bound by the conditions; that if he knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he

Proper
direction for
the jury.

¹ 1 C. P. D. 618.

² 2 C. P. Div. at 422.

³ 1 Q. B. D. 515.

⁴ L. c. at 423.

would be bound if the delivering of the ticket to him in such a manner that he could see there was writing upon it was, in the opinion of the jury, reasonable notice that the writing contained conditions."¹

This question of having reasonable notice of the writing containing conditions Bramwell, L.J., considered rather a matter of law than of fact,² and hence concluded that judgment should be entered for the defendants. To the objection that the conditions imposed on a person might be unreasonable, his answer was :³ "I think there is an implied understanding that there is no condition unreasonable to the knowledge of the party tendering the document, and not insisting on its being read—no condition not relevant to the matter in hand."

The Common Pleas Division had the subject before them again in *Burke v. South-Eastern Railway Company*.⁴ Plaintiff took a ticket from London to Paris from the defendants. On the outside of the cover was "Cheap return ticket, London to Paris and back. Second class," and other matter, but no reference to the inside of the cover. On the inside was a condition limiting the responsibility of the defendants to their own trains. The plaintiff was injured while travelling in France. He sued the defendants, and said he had not read the condition, and did not know it. Cockburn, C.J., directed the jury that if the condition was brought to the plaintiff's notice it was a defence; and, besides, asked the question suggested in *Parker v. South-Eastern Railway Company*,⁵ whether what was done by the company was reasonably sufficient to bring the condition to the notice of the plaintiff. The jury found it to be not, and gave £250 damages. Cockburn, C.J., left the plaintiff to move the Court for judgment, and, on motion, the Common Pleas Division⁶ entered judgment for the defendants without calling on their counsel to argue; holding the whole book to be the contract, and the only contract made with the plaintiff; and distinguishing *Henderson v. Stevenson*,⁷ on the ground that on the face of the card in that case there was printed "Dublin to Whitehaven," and nothing else, and on the back a condition. There the House of Lords split the ticket in two, and said there was room to find that the contract was what appeared on the face of the card; but in this case no such separation was possible.

¹ 2 C. P. Div., at 423. In *Richardson v. Rowntree* (1894), App. Cas. 217, the House of Lords expressed entire agreement with Mellish, L.J.'s, view. *Post*, 1178.

² 2 C. P. Div. at 430.

³ *L. c.* at 428.

⁴ 5 C. P. D. 1.

⁵ 2 C. P. Div. 416.

⁶ Lord Coleridge, C.J., and Lindley, J.

⁷ L. R. 2 H. L. Sc. 470.

Bramwell, L.J.'s, opinion that reasonable notice not a matter of law but of fact.

Burke v. South-Eastern Railway Company.

Henderson v. Stevenson distinguished.

Stephen, J.'s,
doubt in
Watkins v.
Rymill.

The cases
discussed.

Stephen, J., in *Watkins v. Rymill*,¹ seems to throw doubt on this judgment, as he says it "can hardly be supported by any principle short of that laid down in *Zunz v. South-Eastern Railway Company*,² if, indeed, it does not go further." This suggests that the principle involved in *Zunz's* case had been disputed. This is not so. The decision there was that the Railway and Canal Traffic Act, 1854, only extends to the traffic on a company's own lines; so that it does not apply to a contract exempting from liability for loss on a railway not belonging to, or worked by, the company. The point of notice was never directly raised in the case, and consequently never directly decided. True, Cockburn, C.J., said "that when a man takes a ticket with conditions on it, he must be presumed to know the contents of it;"³ that was said with reference to a contract where there was no duty at law, and when, without proof of the contract, there could be no claim against the company. True, also, that the *dictum* has not been accepted as a complete statement of the law in all cases; but those in which it has not been accepted, are cases where either the plaintiff could rely upon a duty apart from the contract or upon special circumstances which rebut the inference drawn from the constitution of the contract—for example, as is pointed out by Stephen, J., in *Henderson v. Stevenson*,⁴ because the document is misleading, and actually misleads. Broadly put, the statement is correct that, where a person sues on a contract, with no other and alternative claim, the terms of the contract must be shewn, and that the apparent terms are presumptively the terms by which both parties must be bound. The imperfection in the *dictum* of Cockburn, C.J., is that it does not express limitations which circumstances, not arising in the case with which he was dealing, might in some cases make material to be considered.

Effect of the
decision in
*Burke v. South-
Eastern
Railway
Company*.

The decision in *Burke v. South-Eastern Railway Company*⁵ is no more than the decision in *Zunz's* case as to luggage applied to passengers.⁶ Apart from special contract there was no duty; and the claim of the plaintiff was to sever the contract, insisting on what made for him, and repudiating what was against him. The decision of the Court was that the whole ticket was the contract; and, in effect, that, the construction of it being for the Court, the plaintiff was out of court.

Effect of the
decision in
*Parker v.
South-Eastern
Railway
Company*.

*Parker v. South-Eastern Railway Company*⁷ may be cited as

¹ 10 Q. B. D. 178, at 187.

² L. R. 4 Q. B. 539.

³ L. c. at 544.

⁴ L. R. 2 H. L. (Sc.) 470.

⁵ 5 C. P. D. 1.

⁶ "An undertaking to transport and deliver beyond the terminus of the carrier's lines is not within the common law liability of a common carrier": per Bowe, J., *Baltimore Railroad Company v. Green*, 25 Md. 72, at 89.

⁷ 2 C. P. Div. 416, at 423.

an authority that where there is writing on a ticket, and the recipient does not know or believe that the writing contains conditions, the question must be submitted to the jury, whether the recipient had notice that the writing contains conditions. The case of the plaintiff is not stated high enough to bring him within this ruling, since his assertion of ignorance was limited to this condition. For example, he must have been aware of the previous condition, "This ticket is available for fourteen days, including the day of issue and expiry," and most probably of the condition, "The cover without the coupons, or the coupons without the cover, are of no value." If so, he came within that branch of the rule laid down by Mellish, L.J., "that if he knew there was writing, and knew or believed that the writing contained conditions, then he was bound by the conditions," and there was no case for the jury. In *Parker v. South-Eastern Railway Company*, Mellish, L.J., must be intended as referring to the passenger being affected with notice of any writing containing conditions, and not of the particular writing, otherwise the rule of law that requires the construction of the whole of a document would be seriously infringed on.

The next case is *Watkins v. Rymill*¹—a decision on the presumption of assent to conditions upon which a waggonette was received by the defendant, the keeper of a repository for the sale on commission of horses and carriages—where Stephen, J., elaborately examines the earlier cases, and enunciates the general principle:² "A great number of contracts are, in the present state of society, made by the delivery by one of the contracting parties to the other of a document in a common form, stating the terms by which the person delivering it will enter into the proposed contract. Such a form constitutes the offer of the party who tenders it. If the form is accepted without objection by the person to whom it is tendered, this person is, as a general rule, bound by its contents, and his act amounts to an acceptance of the offer made to him, whether he reads the document or otherwise informs himself of its contents or not." To this general rule he finds four exceptions:

Watkins v. Rymill.

General rule formulated by Stephen, J.

Four exceptions:

(1) Where the nature of the transaction is such that the person accepting the document does so on the presumption (not unreasonable) that the document is a mere acknowledgment of an agreement not intended to be varied by special terms.³

(1) Reasonable ignorance.

¹ 10 Q. B. D. 178. Cp. *Bonham v. Herriott*, 7 Times L. R. 104; *Bate v. Canadian Pacific Railway Company*, 15 Ont. App. 388.

² *L. c.* at 188.

³ *Parker v. South-Eastern Railway Company*, 2 C. P. Div. 416. See the remarks of

- (2) Fraud. (2) Where there is fraud.
 (3) Mistake. (3) Where the document is misleading, and actually misleads.¹
 (4) Want of equity. (4) Where the conditions are unreasonable in themselves.²

The law as to conditions on passengers' tickets came again before the House of Lords in *Richardson v. Rowntree*.³ The respondent obtained from the appellants a ticket for a voyage on their steamer. Upon the ticket were the words: "It is mutually agreed for the consideration aforesaid, that this ticket is issued and accepted upon the following conditions." One of the conditions was: "The Company is not under any circumstances liable to an amount exceeding 100 dollars for loss of or injury to the passenger or his luggage." The respondent having brought an action to recover damages exceeding 100 dollars, the condition was set up as disentitling her to recover. At the trial three questions were left to the jury:

(i) Did the plaintiff know that there was writing or printing on the ticket?

(ii) Did she know that the writing or printing on the ticket contained conditions relating to the terms of the contract of carriage?

(iii) Did the defendants do what was reasonably sufficient to give the plaintiff notice of the conditions? To the first question the jury answered "Yes;" to the second and third they answered "No." In the House of Lords it was pointed out that these were the questions suggested in *Parker v. South-Eastern Railway Company* as proper to be left to the jury, and it was held, affirming the Court of Appeal, that the leaving them to the jury was correct; and further, that when no other facts are proved than payment of money for a ticket and receipt of a ticket folded up so that no writing was visible unless it was opened and read, defendants are not entitled as matter of law to say the plaintiff is bound by the conditions on the ticket.

Conditions
prima facie to
 be construed
 against the
 company
 propounding
 them.

Since the purpose of conditions is to limit the liability to which the company would otherwise be subject at common law, and as the conditions are expressed in the language of the company, in putting a construction upon them they are to be construed, as far as they are ambiguous, against the company proposing them.⁴ Thus, a

Lush, J., in *Crooks v. Allan*, 5 Q. B. D. 38, at 40, as to a clause "printed in type so minute, though clear, as not only not to attract attention to any of the details, but to be only readable by persons of good eyesight."

¹ *Henderson v. Stevenson*, L. R. 2 H. L. (Sc.) 470.

² *Parker v. South-Eastern Railway Company*, 2 C. P. Div. 416, per Bramwell, L.J., at 428.

³ (1894) App. Cas. 217.

⁴ *Taubmann v. Pacific Steam Navigation Company*, 26 L. T. (N. S.) 704, does not seem to conform to this rule.

statement, forming part of a condition, that "Every attention will be paid to insure punctuality as far as practicable" is not merely a "vague assurance," but a part of the contract of carriage; and when there is "wilful delay or reckless loitering" the company must be held not to have performed the contract entered into with reference to the condition to ensure punctuality.¹ If there is a clear refusal to guarantee the punctuality of their trains, such a condition as part of the contract would be valid,² and the company is protected from everything except wilful misconduct of their servants.³ But if the condition is for the benefit of the company, they may be held to have waived it by their conduct, as in *Jennings v. Great Northern Railway Company*,⁴ where a master took tickets for himself and three

*Jennings v.
Great Northern
Railway
Company.*

¹ *Le Blanche v. London and North-Western Railway Company*, 1 C. P. Div. 286. In this case where the plaintiff, having lost his train, had taken a special train to carry him to his destination, the question whether he was entitled to charge the defendant company for it by way of damages was considered. It was held in the Common Pleas, following the *dictum* of Alderson, B., in *Hamlin v. Great Northern Railway Company*, 26 L. J. Ex. 20, at 22, "The principle is, that if one party to a contract does not perform his contract, the other may do so for him as near as may be, and charge him for the expense incurred in so doing." (The *dictum* does not appear in the report 1 H. & N. 408.) But this was reversed in the Court of Appeal, Mellish, L.J., agreeing, 1 C. P. Div. at 313, that as a general rule this was correct, but that "the question must always be whether what was done was a reasonable thing to do having regard to all the circumstances," and suggesting the rule for the determination of what is reasonable to be "to consider whether the expenditure was one which any person in the position of the plaintiff would have been likely to incur if he had missed the train through his own fault, and not through the fault of the company." In *Lockyer v. International Sleeping Car Company*, 61 L. J. Q. B. 501, a statement in the official guide of a sleeping car company, which has sleeping cars on certain trains running from Paris, that such trains correspond with some leaving London at specified times, was held not to be a warranty of punctuality, but a mere representation that the proper times of the arrival of the trains from London were those mentioned therein, and it was further held that the putting forward such a statement imposes no duty on the company to see that the trains do in fact arrive to time. As to reasonableness of railway company's arrangements, *Pittsburgh, & Co. Railway Company v. Lyon*, 123 Pa. St. 140, 10 Am. St. R. 517, and note at 521. In *Boston and Maine Railroad v. Chipman*, 146 Mass. 107, 4 Am. St. R. 293, a condition that coupons from a book of tickets will not be accepted unless detached by, or in the presence of, the conductor, was held reasonable. Earlier cases on conditions are *Buckmaster v. Great Eastern Railway Company*, 23 L. T. (N. S.) 471; *Thompson v. Midland Railway Company*, 34 L. T. (N. S.) 34. *Mosher v. St. Louis, & Co. Railroad Company*, 127 U. S. (20 Davis) 390, is a case where plaintiff was removed from a train for travelling without compliance with the special conditions of an excursion ticket, and his default was due to the negligence of one of the companies, not the company removing him, over whose line the ticket purported to give him the right to travel, it was held, he could not recover against the company removing him.

² *McCartan v. North-Eastern Railway Company*, 54 L. J. Q. B. 441.

³ *Woodgate v. Great Western Railway Company*, 51 L. T. 826.

⁴ L. R. 1 Q. B. 7. As to duty to produce season-tickets on demand, see *Woodard v. The Eastern Counties Railway Company*, 30 L. J. (M. C.) 196 and 52 & 53 Vict. c. 57, s. 5. As to power of railway company to sue for excess fare beyond the price of tourist tickets where these are used contrary to the by-laws, *Great Northern Railway Company v. Winder* (1892), 2 Q. B. 595. A somewhat extraordinary pretension was advanced in *Harris v. North British Railway Company*, 18 Rettie 1009, where one of the passengers in a railway carriage on the defendants' line having collected the tickets from his fellow-passengers, handed them to the ticket-collector, who, finding one of the tickets to be defective, claimed to treat the passenger handing the tickets to him as if he were the holder of the defective ticket, and to remove him from the carriage. On an action by the passenger, it was held that the person who collects tickets from his fellow-passengers and hands them to the railway company's officer, does not by doing

servants, keeping the tickets in his own care, and telling the guard he had the servants' tickets, when the servants were allowed to enter the train without each shewing his ticket. Upon these facts being shewn, the company were held to be estopped in an action by the master against the company for afterwards expelling the servants from the train from pleading a by-law: "No passenger shall be allowed to enter any carriage or travel therein without having paid his fare and obtained a ticket, which ticket such passenger is to shew when required, and to deliver up before leaving the company's premises."

Passenger may waive his rights.

The passenger also on his part may waive his right to claim the performance of duties which by the contract the company may have in the first instance taken upon themselves.¹

Bound to carry all persons, subject to certain limitations as to conduct, &c.,

In so far as a carrier is a common carrier of passengers—that is, within the limits within which he holds himself out to carry for hire passengers who apply—he is bound to carry, from his accustomed place of setting out to his usual place of destination, all persons who apply, so long as he has convenient accommodation for their safe carriage, and unless there is sufficient excuse for a refusal; and sufficient excuse is, where there is a refusal to obey reasonable regulations, or gross and vulgar conduct, or conduct creating disturbance, or where the character of the suggested passenger is doubtful, dissolute, or suspicious; and *à fortiori* where the character is unequivocally bad, or the object of the journey is to interfere with the business of the carrier.²

Distinction between right to refuse to carry and right to expel.

Although the carrier can properly refuse to carry an improper and dangerous person—*e.g.*, an insane or drunken man,³ or one

so incur responsibility of any kind. In *Erie Railroad Company v. Winter*, 143 U. S. (36 Davis) 60, at 69, parol evidence of what took place between the passenger and the ticket-seller when a ticket was purchased, was held admissible to make up the contract of carriage; "for passengers on railroad trains are not presumed to know the rules and regulations made for the guidance of the conductors and other employees of railroad companies, as to the internal affairs of the company, nor are they required to know them."

¹ *Fitzgerald v. Midland Railway Company*, 34 L. T. (N. S.) 771. As to performance of positive conditions on a ticket, in order to entitle season-ticket holder to a return of his deposit, *Cooper v. London and Brighton Railway Company*, 4 Ex. D. 88. As to obligation of railway company where the train is full, *Great Northern Railway Company v. Hawcroft*, 21 L. J. Q. B. 178.

² *Jencks v. Coleman*, 2 Sumn. (U. S. Circ. Ct.) 221, summing up by Story, J., at 226: "Suppose a person were to come on board, who was habitually drunk, and gross in his behaviour, and obscene in his language, so as to be a public annoyance; might not the proprietors refuse to allow him a passage? I think they might, upon the just presumption of what his conduct would be." *Bennett v. Dutton*, 10 N. H. 481; *Commonwealth v. Power*, 48 Mass. 596, where the "great and leading principles" on the right of a railway company to remove or exclude persons from their trains, according to Hall v. Power, 53 Mass. 482, are laid down. *Pittsburgh Railway Company v. Hinds*, 53 Pa. St. 512; *State v. Steele*, 19 Am. St. R. 573 (an innkeeper's case); *Lowe v. Great Northern Railway Company*, 9 Times L. R. 516; see 52 & 53 Vict. c. 57, s. 5. It is a question of fact for a jury whether a passenger has "failed to produce" his ticket: *Brotherton v. Metropolitan and District Committee*, 9 Times L. R. 645 (C. A.).

³ See previous note. *Atchison, &c. Railroad Company v. Weber*, 52 Am. R. 543.

whose character is bad—he cannot expel him after having admitted him as a passenger and received his fare, unless he misbehaves.¹

With these and the like exceptions, it is the duty of the carrier, a duty imposed on him by the custom of the realm—in other words, by the common law—to carry passengers safely and securely, so that by his negligence or default no injury or damage may happen. A breach of this duty is a breach of the law; and for this breach an action lies founded on the common law, and does not require any contract to support it.²

Duty of carrier to carry passengers safely,

The contract of carriage is always subject to the conditions on which the carrier carries on his business, provided only that the intending passenger has reasonable notice of them. With regard to this it was held in *Mesnard v. Aldridge*³ that the printed conditions of an auction are sufficiently made known to bidders by being pasted up in the auction-room; and the printed conditions of a line of coaches are, with equal reason, sufficiently made known to passengers by being posted up at the place where they book their names.⁴ Since the passengers are

and subject to the conditions under which the carrier conducts his business.

where it is laid down to be “the duty of the railroad company to remove from the train and leave an unattended passenger, who, after entering upon a journey, becomes sick and unconscious or insane until he is in a fit condition to resume his journey, or until he shall obtain the proper assistance to take care of him to the end of his journey.” In the present case the passenger removed had delirium tremens. The judge at the trial charged: “Of course the carrier is not required to keep hospitals or nurses for sick or insane passengers, but when a passenger is found by the carrier to be in such a helpless condition, it is the duty of the carrier to exercise the reasonable and necessary offices of humanity towards him until some suitable provision may be made.”

¹ *Butler v. Manchester, Sheffield, and Lincolnshire Railway Company*, 21 Q. B. Div. 207; *Massiter v. Cooper*, 4 Esp. (N. P.) 260; *Coppin v. Braithwaite*, 8 Jur. 875; *Prendergast v. Compton*, 8 C. & P. 454, per Tindal, C.J., at 462; *Apthorpe v. Edinburgh Street Tramways Company*, 10 Rettie 344; *Highland Railway Company v. Menzies*, 5 Rettie 887; *Pearson v. Duane*, 4 Wall. (U. S.) 605. In *Boylan v. Hot Springs Railroad Company*, 132 U. S. (25 Davis) 146, the right to expel was affirmed where the contract on the ticket excluded the right to travel in the event of non-compliance with certain conditions; but there the contract on the ticket had been signed by the plaintiff. See also *Mosher v. St. Louis, &c. Railroad Company*, 127 U. S. (20 Davis) 390; *Fulton v. Grand Trunk Railway Company*, 17 Upp. Can. Q. B. 428; *Grand Trunk Railway Company v. Beaver*, 22 Can. S. C. R. 498. *Apthorpe v. Edinburgh Street Tramways Company*, *supra*, is a case affirming the right to expel a passenger who has taken a ticket on a condition, and has not complied with the condition. In the case in question the condition was that the ticket should be checked.

² *Bretherton v. Wood* (Ex. Ch.), 3 B. & B. 54; *Ansell v. Waterhouse*, 2 Chitty (K. B.) 1. Though a person injured by a railway company or carrier may elect whether he will sue in contract or tort, this election is personal, so that an action will not lie against a railway company at suit of the master of a servant who has sustained an injury while being carried by them, for the relation arose out of a contract to which the master was not a party: *Alton v. Midland Railway Company*, 19 C. B. N. S. 213; as to this case, see *ante* 211. Where, however, the action is against independent wrongdoers—as, for example, if the contract had been with the Midland Company, and the servant was injured by a train of the Great Eastern's running into the Midland Company's train—the master could recover: *Berringer v. Great Eastern Railway Company*, 4 C. P. D. 163. *Alton v. Midland Railway Company* was followed in *Fairmount and Arch Street Passenger Railway Company v. Stutler*, 54 Pa. St. 375, where a multitude of cases are cited in argument. See *Cooley, Torts* (2nd ed.), 106 and note; also *Taylor v. Manchester, Sheffield, and Lincolnshire Railway Company*, (1895); 1 Q. B. 134, *post*, 1212.

³ 3 Esp. (N. P.) 271.

⁴ *Whitesell v. Crane*, 8 Watts & Ser. (Pa.) 369. *Ante* 1078.

Effect of the
issue of a
time-table.

Denton v.
Great Northern
Railway
Company.

bound to conform to the regulations of the carrier so far as they are reasonable and they have reasonable notice of them, so, too, is the carrier bound by his public profession; as, for example, when he circulates time-tables, he is bound to start at or about the time he represents. There has been some doubt about the ground on which this obligation is placed. In *Denton v. Great Northern Railway Company*,¹ Lord Campbell, C.J., and Wightman, J., were of opinion that the putting forth of a time-table by the company amounted to a contract with those who came to the station in consequence. To this Crompton, J., did not assent,² but was much inclined to think that the company, by holding out the time-table as theirs, and by not carrying in accordance with the times therein specified, committed a breach of their duty as public carriers, by which they were bound to carry according to their public profession. The whole Court, however, agreed that the company were liable on the ground of fraudulent representation.³

In the subsequent cases the view that there is a contract seems to have been adopted without further controversy.⁴

Hurst v. Great
Western
Railway
Company.

In *Hurst v. Great Western Railway Company*⁵ the circumstances were a little peculiar. The company's time-table, which "would, doubtless, have shewn that there was an absolute repudiation of a warranty of punctuality,"⁶ was not put in, but the plaintiff claimed to recover on proof that he took a ticket at Cardiff to be carried on the Great Western Railway to Newcastle *via* the Midland Railway. The grievance was that the train by which he was to proceed on his journey, instead of arriving at Cardiff at the regular time, was nearly an hour and a half late. The plaintiff got a verdict, but judgment was entered for the defendants by the Court of Common Pleas, as "the mere taking of a ticket does not amount to a contract on the part of a railway company, or impose upon them a duty to have a train ready to start at the time at which the passenger is led to expect it; and, in order to maintain an action, it is incumbent on the plaintiff to shew either a breach of contract or a breach of some legal duty."⁷

¹ 5 E. & B. 860; this case is criticized, Pollock, *Contracts* (6th ed.), 15, but appears to be treated as good law in *Carlill v. Carbolic Smoke Ball Company* (1893), 1 Q. B. 256 at 272. Cp. *Hamlin v. Great Northern Railway Company*, 1 H. & N. 408; *Hobbs v. London and South-Western Railway Company*, L. R. 10 Q. B. 111.

² 5 E. & B. at 868.

³ In *Cooke v. Midland Railway Company*, 9 Times L. R. 147 (C. A.), on the question of reasonable time, Lindley, L.J., says: "A man could not be compelled to wait more than a couple of hours at a station after the proper time for the train to arrive." See *Great Western Railway Company v. Lowenfeld*, 8 Times L. R. 230, a judgment of his Honor Judge Stonor.

⁴ *Le Blanche v. London and North-Western Railway Company*, 1 C. P. D. 286.

⁵ (1865) 19 C. B. N. S. 310.

⁶ *L. c.* per Willes, J., at 320.

⁷ Per Erle, C.J., 19 C. B. N. S. at 317.

The representation made by a carrier by means of a time-table is somewhat in the nature of an advertisement offering a reward; and, therefore, though when once publicly made it becomes binding if accepted before it is retracted;¹ yet it is not irrevocable, but may be retracted by a notice of the change made, circulated as extensively as the notice of the regular trains, or in such a way as it would be reasonably calculated to come to the intending passengers' knowledge; or, indeed, if there is a reservation of the right to make occasional changes in the running of particular trains, he would be bound to make reasonable inquiries whether such reservation has been acted on.²

Nature of the representation by a carrier; its effects.

When once the passenger has been received he must, if he desire it, be carried the whole route;³ so that, if the usual place of alighting from a stage-coach is at an inn-yard, the passenger must be put down there, and cannot be compelled to alight even at the inn gate.⁴ That is, the carrier's duty is absolute,⁵ and, in case of disablement by accident of the conveyance he provides, he is bound to provide another⁶ for the completion of the journey. He is bound to stop at the usual places, and to allow the usual intervals for refreshments;⁷ for it may be that the practice of stopping at certain places is the passenger's reason for preferring that particular conveyance to another line.⁸

Duty to carry the whole way.

The law does not exactly define for what length of time stoppages should be made on the way, for the purpose of enabling passengers for intermediate stations on the route to alight. This is for the jury in estimating the facts of the individual case; but "prudence and duty would require a conductor to detain a train longer to pass out fifty aged females than five active men";⁹

Time for stoppages.

¹ *Shuey v. United States*, 92 U. S. (2 Otto) 73; *Carlill v. Carbolic Smoke Ball Com.* (1893), 1 Q. B. 256, per Bowen, L. J. at 268; *Boston and Maine Railroad v. Bartlett*, 57 Mass. 224, at 227. See Pollock, *Contracts* (6th ed.), 13-25.

² *Sears v. Eastern Railroad Company*, 96 Mass. 433.

³ *Massiter v. Cooper*, 4 Esp. (N. P.) 260.

⁴ *Dudley v. Smith*, 1 Camp. 167.

⁵ *Ker v. Mountain*, 1 Esp. (N. P.) 27.

⁶ *Jeremy, Carriers* (ed. 1815), 23: "*a fortiori* the proprietors are bound to carry them [passengers] to the place to which they profess their coach to go, and cannot refuse to proceed at any intermediate stage; and in case of accident they would be bound to provide another conveyance; for their undertaking is absolute."

⁷ On long routes, "easy and safe modes and reasonable time for obtaining food and safe ingress and egress to and from refreshment stations" must be afforded: *Peniston v. Chicago &c. Railroad Company*, 34 La. Ann. 777, 44 Am. R. 444. But a passenger may not leave the train for other business, and an answer given by a conductor as to the length of time the train is to wait neither increases nor diminishes the duty or liability of the company to a passenger who has relied on the statement made to him: *Missouri Pacific Railway Company v. Foreman*, 15 Am. St. R. 785, and note at 787.

⁸ *Jeremy, Carriers*, 23: "So if there is a general usage to allow certain intervals for refreshment, they cannot vary at their pleasure those usages which are perhaps a reason for preferring their conveyance to the less convenient arrangement of other proprietors." Cp. *Barker v. New York Central Railroad Company*, 24 N. Y. 599.

⁹ Per Buffington, P. J., charging the jury in *Pennsylvania Railroad Company v. Kilgore*, 32 Pa. St. 292, at 293.

and the question that must be left to the jury in each case is, whether in the actual facts of the particular case reasonable time to leave the carriage was afforded.¹

Duty during transit.
Blamires v. Lancashire and Yorkshire Railway Company.

Blamires v. Lancashire and Yorkshire Railway Company,² in the Exchequer Chamber, throws light on the duty of a railway company to their passengers, where an Act of Parliament exists, bearing upon the circumstances of the transit, though not determining the matter. By the Regulation of Railways Act, 1868,³ s. 22, "every company shall provide, and maintain in good working order, in every train worked by it which carries passengers and travels more than twenty miles without stopping," means of communication between the passengers and the servants of the company in charge of the train. In an action for negligence brought by a passenger in a train within the meaning of the Act, it appeared that the precaution had not been adopted, and the plaintiff relied on this want of communication between the passengers and the guard as constituting negligence in the defendants, though the accident was caused by the breaking of a tire across a rivet-hole. There was some evidence that if such means of communication had existed the accident might have been prevented.

Direction to the jury of Kelly, C.B.

Kelly, C.B., at the trial, directed the jury⁴ that "it is not every disobedience to an Act of Parliament that will constitute negligence in a railway company so as to make the railway company responsible for accidents of this nature. It is only if the duty imposed by the Act of Parliament be such that the breach of it, the neglect of the duty, was likely to conduce to an accident of this nature, that the Act of Parliament would have any effect upon it; and if there had been any duty imposed on the company, any precaution which they ought to have taken, and which they have failed in taking, any duty which they have not performed, and the non-performance of which led to this accident or was likely to conduce to this accident, then, whether there was an Act of Parliament or not, that breach of duty is worthy of your consideration to see whether you can find negligence." The jury found there was no negligence in respect of the breaking of the tire, but that the want of communication was negligence.

The case taken to the Exchequer Chamber.

In the Exchequer Chamber the verdict of the jury was sustained, on the ground that it was right to use the Act as some evidence of what due and ordinary care in the circumstances would be. This

¹ *Pennsylvania Railroad Company v. Kilgore*, 32 Pa. St. 292.

² L. R. 8 Ex. 283.

³ 31 & 32 Vict. c. 119.

⁴ L. R. 8 Ex., at 286.

is put most clearly by Grove, J., who said :¹ "Negligence must depend very much on the state of knowledge at the time. If a particular precaution has not been hitherto known or used, or if its use is obscure, the omission of it is not negligence ; but if it is used to any considerable extent, that changes the case, and makes the omission some evidence of negligence. . . . The Act is important evidence, as shewing, not merely that the means existed, but that it was known and was sanctioned by the Legislature." Blackburn, J., limits his decision.² "We have not to decide," said he, "whether, if the Act did not apply, there was sufficient evidence to shew that it was the duty of the company to provide means of communication, whether such an obligation was cast upon them by the common law duty to take reasonable care of their passengers." He prefers to "leave it open for future decision what may be the duty of companies in cases where the train is intended to stop at shorter distances than twenty miles, and what may be the effect of the Act in that case." This reservation does not affect the principle laid down by Grove, J., and also by Brett, J.³ (which is, that proof of ordinary usage is admissible to shew whether a particular act is careful or not, and that "it is right to use the act as some evidence of what is due and ordinary care under the circumstances of this case") ; but seems rather directed to the proposition that, when the Legislature has made provisions for some special object, the exceptional state of things thereby provided against is not to be erected into a standard for deciding what should ordinarily be done or omitted.

Relativity of the notion of negligence enforced by Grove, J.

Judgment of Blackburn, J.

Considered.

The duty owed by a railway company to their passengers is to take reasonable care—to use the best precautions in known practical use for securing their safety and convenience. The jury have to say what is reasonable care and whether proper precautions have been used.⁴ Still, passengers are not entitled to expect the utmost care that can possibly be conceived ; for the management of railways is a matter of practical experience to which additions are made day by day. It is not, therefore, necessary that every suggestion of science should be adopted ;⁵ although it is the duty of railway companies to use every pre-

Duty to use best practical precautions.

¹ L. c. at 289.

² L. c. at 288.

L. c. at 289.

⁴ A company were held liable in *Flint v. Norwich and New York Transportation Company*, 34 Conn. 554, for an injury caused by the explosion of a gun caused by some disorderly soldiers carried by the company under a Governmental obligation ; and in *Simmons v. New Bedford Steamboat Company*, 97 Mass. 362, where passengers scrambled into a small boat hung over the deck of a steamboat, and caused it to fall on other passengers ; also where the passenger was an infant, and the conductor was found to have been negligent in not warning him of the danger of attempting to alight while the tram was in motion, *Hemmingway v. Chicago, &c. Railway Company*, 7 Am. St. R. 823 ; *sed quare*, whether the duty is not too widely laid down.

⁵ *Hanson v. Lancashire and Yorkshire Railway Company*, 20 W. R. 297 ; *Wisely*

Safeguards
sacrificing
convenience
not demanded.

caution in known practical use. There are certain safeguards which can only be secured by the sacrifice of conveniences¹—as, for instance, a slower rate of speed, which may add something to the security while greatly sacrificing the convenience of the passengers. A company is not liable merely for preferring considerable convenience to a slight enhanced security in travelling.² If, then, a precaution which is adopted by a railway company in obedience to a statute,³ does not indicate any advance in science or aid to security, the fact of legislative enactment does not add anything to the obligation of the company to take collateral and additional precautions for the safety of passengers. If, on the other hand, the legislative requirement denotes a recognised sense of the propriety of such a safeguard as is there stipulated for with all its incidental improvements, it seems to be evidence of the growth of that practical experience to the assured results of which railway companies are bound to conform.⁴

Duty to test
and inspect
material.

The duty of a railway company to their passengers is not discharged by purchasing from reputable manufacturers the iron rods or other iron work used in the construction of their bridges. There is a duty besides on the company to test and inspect and not implicitly to rely on the reputation of the manufacturers from whom they procure their material. This duty of inspecting and testing does not end when the materials are put in their place, but continues during their use and is a duty to ascertain from

v. Aberdeen Harbour Commissioners, 14 Rettie 445; *Robinson v. New York Central, &c. Railroad Company*, 20 Blatchf. (U. S. Circ. Ct.) 338; *Titus v. Bradford, &c. Railroad Company*, 136 Pa. St. 618, 20 Am. St. R. 944.

¹ In America it has been held that a railway company is liable to a person waiting for a train in a proper place and using due care, who is struck by a mail-bag thrown from the postal car, though it was a well-known custom to throw bags as the train was passing through stations: *Snow v. Fitchburg Railroad Company*, 136 Mass. 552. This was on the ground that the act was itself dangerous, and the company therefore owed a duty of precaution; *Carpenter v. Boston Railroad Company*, 97 N. Y. 494; and in *Old Colony Railroad v. Slaven*, 148 Mass. 363, 12 Am. St. R. 558, a railway company against whom a judgment has been recovered by one who sustained personal injuries through the obstruction of a side-walk at its station by mail-bags, is not a joint wrongdoer with mail-carriers who negligently caused the obstruction in such a sense as to prevent a recovery by it of the amount of the damages paid by it. *Ante*, 200.

² *Ford v. London and South-Western Railway Company*, 2 F. & F. 730, and *Stokes v. Eastern Counties Railway Company*, 2 F. & F. 691. Cp. *Freemantle v. London and North-Western Railway Company*, 2 F. & F. 337, at 340.

³ *Ante*, 365 and 764.

⁴ There is an American case on a somewhat ludicrous point, deciding that a railway company is not liable for the neglect of its guard to fulfil his promise to wake a passenger, whereby he was carried beyond his destination: *Nunn v. Georgia Railroad*, 51 Am. R. 284. *Pullman Palace Car Company v. Smith*, 23 Am. St. R. 356, however, improves on this by deciding that a sleeping car company is answerable for failing to wake its passengers, whereby they pass their station, even when their contract is with the railway company and not with the defendant company. Another American case which may be looked at is *Carpenter v. New York, &c. Railroad Company*, 124 N. Y. 53, 21 Am. St. R. 644, which gives the American view of the duty of a railway company to watch passengers in sleeping cars to prevent money being abstracted from beneath their pillows. The note to 21 Am. St. R. 647 indicates the leading authorities on the rights, duties, and liabilities of sleeping car companies.

time to time whether things in their nature liable to deteriorate are being impaired either by use or by exposure to the elements.¹

To determine what improvements are and what are not required to be adopted by railway companies, several factors have to be considered. They are bound to avail themselves of all improvements which will contribute materially to the safety of the passengers, when the utility of such improvements has been thoroughly tested and demonstrated,² but subject to a reasonable regard to the ability of the company and the nature and cost of the improvements.

What improvements should be adopted.

If the improvement relates to a matter in respect of which there are numerous accidents, and can be effected at a small cost, the obligation on the railway company to adopt it is peremptory. On the other hand, if the improvement is a matter of inadequate benefit at a cost of great expense, or even of trivial concern without the probability of expense, they are not bound to adopt it.³ The case of *Cornman v. Eastern Counties Railway Company*⁴ is somewhat in point. Plaintiff, being at the defendants' station on Christmas Day, was driven by a crowd against a portable weighing-machine, the foot of which projected about six inches above the level of the platform. The machine was unfenced, and had stood in the same position without any accident occurring to passers by for about five years. Evidence was given that most of the great railway companies adopted precautions rendering such an accident impossible. The judge at the trial told the jury⁵ "that one Company was not bound to adopt all the arrangements of another; and he asked them whether they thought that the machine was so constructed, and in such a position as that, without any negligence of persons coming on the platform, accidents might occur." The jury found for the plaintiff. The Court of Exchequer entered the verdict for the defendant.

Cornman v. Eastern Counties Railway Company.

Bramwell, B., said:⁶ "I think that all the ingredients to make out a case of negligence against the Company exist, except that proof is wanting that the mischief which happened is one which could have been foreseen. In such a case it is always a question whether the mischief could have been

Bramwell, B.'s, opinion.

¹ *Murphy v. Phillips*, 35 L. T. (N. S.) 477; *Manser v. The Eastern Counties Railway Company*, 3 L. T. (N. S.) 585; *Stokes v. The Eastern Counties Railway Company*, 2 F. & F. 691; *Louisville, &c. Railway Company v. Snyder*, 10 Am. St. R. 60.

² See the remarks of Kekewich, J., *National Telephone Company v. Baker* (1893), 2 Ch. 186, at 205.

³ *Smith v. New York, &c. Railroad*, 19 N. Y. 127.

⁴ 4 H. & N. 781. A similar case is *Blackman v. London, Brighton and South Railway Company*, 17 W. R. 769. For the American cases, see *Hamilton v. Texas Railroad Company*, 53 Am. R. 756; *Gillis v. Pennsylvania Railroad Company*, 98 Am. Dec. 317, and note at 322.

⁵ 4 H. & N. at 783.

⁶ *Bramwell, B.'s, opinion*, l. c. at 786.

Rule stated by Williams, J., in *Toomey v. The London, Brighton and South Coast Railway Company*.

reasonably foreseen. Nothing is so easy as to be wise after the event. But here no witness stated that he would have known that the position of the weighing-machine was likely to cause danger. I adopt the rule stated by Williams, J., in *Toomey v. The Brighton Railway Company*:¹ 'It is not enough to say that there was some evidence; a *scintilla* of evidence,² or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the judge in leaving the case to the jury; there must be evidence on which they might reasonably and properly conclude that there was evidence.' Here the evidence was that the company might reasonably have anticipated that no mischief could occur, since no mischief had resulted from keeping the machine in the position in which it stood for so long a period."³

Hart v. Lancashire and Yorkshire Railway Company.

*Hart v. Lancashire and Yorkshire Railway Company*⁴ also illustrates the duty of railway companies to their passengers in this respect. A pointsman having but an instant to decide what to do with a runaway engine (the man in charge of which, who was alone, had fallen down in a fit), turned it into a siding on which there was a train at rest, rather than allow it to meet an advancing express train. The plaintiff who was in the train at rest, was injured, and sued the company for damages for negligence; first, in not having two men on the engine while engaged in coaling, from which it was returning when the fit of the driver left it without guidance; and, secondly, in having the points of the sidings so arranged that the engine must necessarily, in case of the driver being incapacitated, pass on to the main line. The fact that an alteration had been made since the accident, so that a runaway engine would pass along a supplementary siding leading up to a "dead end," was urged as evidence of previous negligence.

Contended that coaling an engine is dangerous work.

The contention as to the first point was that the work of coaling an engine was dangerous from an alleged liability of the men engaged in the work to become affected by the sulphurous vapour arising from the burning coal. In the absence of evidence, the Court refused to accept this, Kelly, C.B., remark-

¹ *Toomey v. The London, Brighton and South Coast Railway Company*, 3 C. B. N. S. 146. Cp. as to this, *Dublin, Wicklow, and Wexford Railway Company v. Slattery*, 3 App. Cas. 1155. This case is not, however, within the rule there enunciated; for what the Court practically say is, that the evidence given was susceptible of either reading, and that could not affect the defendants with liability, since the plaintiff must give evidence that points to a conclusion of negligence. *Ante*, 162 *et seqq.*

² As to this see Best, *Evidence* (8th ed.), 63.

³ Cp. *Sturges v. Great Western Railway Company*, 8 Times L.R. 231 (C. A.); *Nicholson v. Lancashire and Yorkshire Railway Company*, 34 L. J. Ex. 84; *Jones v. Grand Trunk Railway Company*, 16 Ont. App. 37.

⁴ 21 L. T. (N. S.) 261.

ing: "Surely, it was never heard that sickness of any kind was ever produced by it. If, then, this be an operation usually conducted by one man and without any ill results arising therefrom, it would surely be a very strong thing to say that the not employing two men to perform the operation was negligence on the part of the Company. As to the second point, the Court held it to be most unreasonable to hold the company negligent in not foreseeing that the plan which had been in use safely for twenty years would occasion an accident; and the fact that, when they found that it had resulted in an accident they altered their method should even less be a circumstance going to fix them with liability. As Bramwell, B., said in his forcible way: "People do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell juries, to hold that, because the world gets wiser as it gets older, therefore it was foolish before."¹

Subsequent precaution not necessarily evidence of antecedent neglect.

On the other hand, the fact of previous accidents at the same place, in similar circumstances, may be given in evidence as tending to shew that the attention of the parties responsible had been called to the position of things there, and that they had failed to provide proper means for providing against accident.² While the making of repairs after an accident, though inadmissible as evidence of antecedent negligence, may yet be evidence in the nature of an admission that the duty to repair is on the person doing the repairs.³

Significance of previous accidents.

Repairs after accident.

The consideration pointed out by Lindley, L.J., in *Thomas v. Great Western Colliery Company*,⁴ must also not be for-

Thomas v. Great West Colliery Company.

¹ Two suggestions were thrown out in this case that may be noted. First, one by Bramwell, B., whether the pointman, whose presence of mind saved a great catastrophe, was not liable in trespass, since his act was voluntary and wilful. As to this see per Lord Macnaghten, *Jenoure v. Delmege* (1891), App. Cas. 73, at 77, and *ante*, 177. And secondly, one by Cleasby, B., whether the company could be held responsible for an injury proximately caused by such an act of their servant done under such circumstances. As to this, see *Limpus v. London General Omnibus Company*, 1 H. & C. 526, and *ante*, 700. Bramwell, B.'s remark in the text is expanded in *Diamond Match Company v. Newhaven*, 3 Am. St. R. 70, at 73, and cited with approbation as expressing also the rule in the United States in *Columbia Railroad Company v. Hawthorne*, 144 U. S. (37 Davis) 202. The same principle was acted on in *Sanitary Commissioners of Gibraltar v. Orfila*, 15 App. Cas. 400, at 413; *Great Western Railway Company v. Davies*, 39 L. T. (N. S.) 475.

² *District of Columbia v. Armes*, 107 U. S. (17 Otto) 519, at 526.

³ *Readman v. Conway*, 126 Mass. 374, explained *Shinners v. Proprietors of Locks and Canals*, 154 Mass. 168, at 170: "For the same reason," it is there said, "the fact that a city makes repairs upon a highway after an accident thereon, has been held admissible to show an acceptance of the highway as dedicated." The statement of the rule in *Morse v. Minneapolis, &c. St. Louis Railway Company*, 30 Minn. 465, reproduced in *Columbia Railroad Company v. Hawthorne*, 144 U. S. (37 Davis) 202, at 208, laying down that such evidence "ought not to be admitted under any circumstances" must therefore be qualified by the addition of some such words as "for that purpose," or their equivalent.

⁴ 10 Times L. R. 244 (C. A.).

gotten. A particular kind of brattice cloth, well known to be inflammable, was kept for a long period in proximity to an engine which emitted sparks, and no accident had happened. From this it was sought to argue absence of negligence. His Lordship refuted this contention by pointing out that "long immunity from accident did not prove absence of carelessness. It might only prove long-continued habitual negligence"; and this was the conclusion actually drawn in the particular case before the Court.

Observation of
Lindley, L.J.

Strip of ice ex-
tending half
across a
platform.

The Court held there was evidence of negligence where a passenger, walking by daylight up and down the platform of a station, was injured by slipping on a strip of ice extending half way across the platform, and of the presence of which no explanation was given.¹

Withers v.
North Kent
Railway
Company.

Again, in *Withers v. North Kent Railway Company*,² an accident happened through the bad condition of an embankment, made five years previously, through a marshy country subject to floods, after an extraordinary storm, accompanied for sixteen hours with very violent rain which washed away the soil of the embankment leaving the "sleepers" of the railway unsupported, so that the embankment gave way as the ordinary express train went over them. The negligence alleged was, first, the construction of a line "on a low embankment composed of a sandy sort of soil likely to be washed away by water, and that the culverts were insufficient to carry off the water;"³ and, secondly, the rate of speed at which the train was going at the time. The jury found for the plaintiff, with heavy damages, but the Court directed a new trial. As to the first point, "the line had lasted five years in a country subject to floods, and it does not appear that there had been any accident or objection to its construction until this extraordinary flood occurred. The company were not bound to have a line constructed so as to meet such extraordinary floods." As to the second, the speed "was the ordinary express train speed, and there had been nothing to indicate there would be danger in continuing it."⁴

¹ *Shepherd v. Midland Railway Company*, 25 L. T. (N. S.) 879. Cp. *Crafter v. Metropolitan Railway Company*, L. R. 1 C. P. 300—the case of brass nosing to steps of a railway station worn smooth; *Davis v. London and Brighton Railway Company*, 2 F. & F. 588—it is not enough to shew improper condition of station if accident not caused thereby; *Rigg v. Manchester, Sheffield, and Lincolnshire Railway Company*, 14 W. R. 834—the *opinion* of witnesses that a platform is dangerous no evidence of it; *Longmore v. Great Western Railway Company*, 19 C. B. N. S. 183—faulty construction of bridge.

² 27 L. J. Ex. 417. This case and *Ruck v. Williams*, 3 H. & N. 308, are commented on in *Great Western Railway Company of Canada v. Braid*, 1 Moo. P. C. (N. S.) 101.

³ This evidence was objected to, as not relevant to the case laid in the declaration, but it was admitted.

⁴ Per Pollock, C.B., 27 L. J. Ex. at 418.

In none of these cases was the state of circumstances revealed by a subsequent accident considered sufficient to warrant the inference of a negligent inefficiency. They rather point to the conclusion that, if apart from the accident a presumption could have been reasonably drawn against the suitability of the provision made, the defendants in each case would have been liable. The ground for imputing liability is not what a reasonably prudent man would conclude, with the fact of an accident having arisen to direct his judgment, but what a reasonably prudent man would conclude as to the likelihood of an accident occurring, apart altogether from the fact of its occurrence.

Where questions of engineering skill are involved, it is obvious that a jury is no fit tribunal to decide them. The rule to be adopted in such cases is similar to that observed in the case of actions for negligence against solicitors or medical men. The judge has to define the circumstances, and it is for the jury to determine whether their existence in the case before them has been proved.¹

Questions of engineering skill not for a jury unless with specific directions.

In *Tuttle v. Detroit, Grand Haven and Milwaukee Railway*² the accident sued on was alleged to have arisen by reason of a particularly sharp curve in one of the defendants' yards. Liability was negatived on the ground of the plaintiff's acquaintance with the appliances amongst which his work lay; but the Court added :³ "It appears that the curve was a very sharp one at the place where the accident happened, yet we do not think that public policy requires the courts to lay down any rule of law to restrict a railroad company as to the curves it shall use in its freight depôts and yards, where the safety of passengers and the public is not involved; much less that it should be left to the varying and uncertain opinions of juries to determine such an engineering question."⁴ From which expression of opinion we may gather that, in the opinion of the Court, in no case is the determination of an engineering question for the jury, at least without specific directions; and, secondly, that in those portions of a railway system which are open for passengers, or in immediate connection with which they may be placed, a more stringent rule must be adopted than applies to those portions where those alone who are engaged in the working of the line may be expected to resort.

Tuttle v. Detroit, Grand Haven and Milwaukee Railway.

As, then, the standard of care and duty is a variable one, the amount is not to be fixed by reference to the conduct of other railway companies in the vicinity, and certainly not by their

Standard of care a variable one.

¹ *Hunter v. Caldwell*, 10 Q. B. 69.

² *L. c.*, per *Bradley, J.*, at 194.

³ 122 U. S. (15 Davis) 189.

⁴ *Ante*, 11.

usual conduct, for an agreement, express or tacit, amongst railway companies can in no circumstances be held to jeopardise the safety of the passenger.¹ As it was said in *Metzgar v. Chicago, Milwaukee, &c. Railway Company*:² "A fault is none the less a fault because it is common."

Railway company may not experiment with the safety of their passengers.

While a railway company is not allowed with immunity to lag behind the standard of safety generally held requisite, on the other hand, it is not permitted, without responsibility, to introduce untried novelties. That which has been approved as safe by experience may, of course, be adopted. Where, however, the consequences of any defect developing in untried machinery or agencies would be the exposing human life to hazard, it devolves on those making an experiment which turns out badly to shew that they have followed such a course as the rules of science or mechanics applicable to the matter in hand warranted them regarding as safe according to ordinary probabilities. They must themselves assume the risk of their experiments resulting in failure, and they are not permitted to shift the consequences on their passengers or employes.³

Duty to provide means of alighting.

The duty of railway companies to provide means of alighting for their passengers has been the subject of a series of decisions,⁴ in the course of which many fine distinctions have been drawn. Though it has never in terms been decided that it is the duty of a railway company to provide a platform for the purposes of alighting, it has been assumed in England that the stopping a

¹ *Grand Trunk Railroad Company v. Richardson*, 91 U. S. (1 Otto) 454. Cp. *Wisely v. Aberdeen Harbour Commissioners* (1887), 14 Rettie 445.

² 14 Am. St. R. 224, at 225, referring to *Hamilton v. The Des Moines Valley Railroad Company*, 36 Iowa 31, where it is said, at 38: "If, because an act is usual and common, it ceases to be negligent, it follows that the sure way of escaping liability for injuries to persons and property, in cases of this character would be to adopt a certain and uniform system of common negligence."

³ *Marshall v. Widdicomb Furniture Company*, 11 Am. St. R. 573.

⁴ In *Geirk v. Connolly*, 13 Vict. L. R. (Law) 446, the Supreme Court of Victoria held that where a carrier of passengers had stopped at an ordinary stopping place at the request of certain passengers to enable them alight, he was liable to one who had given him no intimation of her wish to alight for driving on while she was in the act of alighting, and thereby causing her injury; since it was his duty, before going on, to ascertain whether all had alighted who had wished to do so. In *Louisville and Nashville Railroad Company v. Crunk*, 12 Am. St. R. 443, it was held that where a railway company has issued a ticket to an invalid with knowledge that he is too feeble to walk, his assistants who carry him into the train have a reasonable time to leave the train, just as if they were passengers, even though they voluntarily offered their services to carry the passenger. In a note to this case are collected the decisions on what is sufficient time to alight. While a passenger is leaving a steamer for a lawful purpose and is on the premises of the steamboat company, the same degree of care is exacted from the company as is required while the passenger is on the boat: *Dodge v. Boston and Bangor Steamship Company*, 148 Mass. 207, 12 Am. St. R. 541. In *Evansville &c., Railroad Company v. Duncan*, 92 Am. Dec. 322, the Court, in speaking of a person leaving a train while in motion, says: "If the leap was made under such circumstances that a person of ordinary caution and care would not have apprehended danger therefrom, then it was not such an act of carelessness as would relieve the defendant from the responsibility otherwise resting upon it." This was approved *Louisville and Nashville Railroad Company v. Crunk*, 12 Am. St. R., at 449.

train, for the purpose of enabling passengers to alight, warrants the inference that there is a platform on which they can alight, unless some intimation is given them to the contrary.¹

The duty of the company in the case of the absence of a platform has been a matter of more difficulty to settle. In *Foy v. London, Brighton, and South Coast Railway Company*² the train was too long to be all drawn up at the platform, and the plaintiff's wife was asked by the porter to alight a little beyond the end of the platform; in doing so she was injured. The Court of Common Pleas were of opinion that the company were liable for negligence, "because the place and the means of descent provided were not reasonably convenient." It is to be noted that it was assumed that the plaintiff was intended to alight. The decision is not that any of the preliminaries were wanting, but, all things being provided, the provision was not that reasonable provision without which the obligation of the carrier is not discharged. But in *Harrold v. Great Western Railway Company*³ judgment was entered for the defendants, where the plaintiff, knowing that the carriage in which he was had overshot the platform, without waiting to see whether or not the train would be backed, so as to bring the carriage back to the platform, chose to get out of the carriage in the dark, and in so doing missed his footing and fell upon the line (which at that spot was upon an embankment) and, rolling over the embankment into the roadway beneath, was injured. Here the decision turned on the doubt whether the preliminary conditions to alighting were complied with. The railway company had not shewn with sufficient unequivocality that the state of things they looked to as the condition prior to alighting had been brought about. The defendants succeeded because the plaintiff had not shewn that the time for alighting had arrived. And that was assumed in their favour which, in the earlier case, had been decided against the company, that the place for alighting was not reasonable.

The cases, then, so far from being contradictory, are complements the one of the other. Harrold's case is very like in its facts to *Siner's*,⁴ which has been before alluded to, and which was decided in the Exchequer Chamber. The only material distinction is that in *Siner's* case the plaintiff jumped down from the carriage in daylight, while in Harrold's case the plaintiff jumped down in the dark. The judges in the Exchequer Chamber

¹ *Siner v. Great Western Railway Company*, L. R. 4 Ex. 117, per Hannen, J., at 124; see, too, what is said in *Bridges v. North London Railway Company*, L. R. 7 H. L. 213.

² (1865) 18 C. B. N. S. 225.

³ (1866) 14 L. T. (N. S.) 440.

⁴ L. R. 4 Ex. 117.

(Keating, J., who tried the case, dissenting) affirmed the judgment of the Court of Exchequer (Kelly, C.B., dissenting), making absolute a rule for a nonsuit on the ground that there was no evidence for the jury.

Considered.

The decision was based on the fact that there was no evidence of invitation to alight—no evidence that a reasonable time had been given for the alighting of the people in the other part of the train. This must have been effected before the train could have been put back for the plaintiff to alight. Further, there was evidence that the plaintiff could see where she was getting out, and the risks attending her movements. The decision, in short, is on the same point as in Harrold's case; where the plaintiff, to prove his case, had to shew that the company had provided for his alighting, or had given him a reasonable expectation that they looked to his alighting there and then; as he failed to give any evidence of this, and the facts were equally consistent with some additional precaution being taken by the company before the proper time for alighting arrived, the plaintiff was held disentitled to recover. In addition to this, the majority of the Exchequer Chamber were of opinion that the whole surroundings being apparent to the plaintiff, and the risk, if any, manifest, the plaintiff, in jumping from the carriage without making any requisition to the company's servants for other or additional facilities to alight, and without an invitation to alight, was the author of her own wrong, so that the case thus became one of simple contributory negligence.

Praeger v. Bristol and Exeter Railway Company

*Praeger v. Bristol and Exeter Railway Company*¹ was also carried to the Exchequer Chamber. The platform of the station, "at the end which was first reached by the train," instead of having its edge parallel with the line of the train, sloped off into a curve. The plaintiff sat in the compartment drawn up opposite the curved part, so that a space of eighteen inches or two feet were left between the footboard and the platform. A guard opened the door, but said nothing. It was a dark evening, and the station was dimly lighted. The plaintiff, stepping out, fell between the carriage and the platform, and was injured. The Court of Exchequer Chamber, consisting of seven judges, unanimously held there was evidence of negligence.² This decision is a very clear one. The receding of the platform was in the nature of a trap; the opening of the door by the guard constituted an invitation to alight; while "the evening was

Discussed.

¹ (1871) 24 L. T. (N. S.) 105.

² Overruling the Court of Exchequer, Kelly, C.B., and Pigott, B.; Martin, B., dissenting.

dark, and the station dimly lighted." Had there been no platform at all, the case would have been much more arguable. As there was a platform up to within such a space of the carriage door as would be sufficient to mislead into the confidence that it was continuous without affording the safety of a continuous platform, the defendants had not only not provided a platform, but had suggested its existence while they withheld its use.

*Cockle v. London and South-Eastern Railway Company*¹ followed *Praeger v. Bristol and Exeter Railway Company*². There was the same receding of the platform, the same alighting by the plaintiff and injury, and action. In *Cockle's* case, the evidence went in one respect even further than in *Praeger's*. "It was a very dark night," and "the part of the platform at which the train would in the ordinary course have stopped was well lighted with gas-lamps, but the light towards the place where the accident happened had been put out, because at that place the trains did not usually stop or the passengers alight."³ In another respect it did not go so far. In *Praeger's* case the guard opened the carriage door; in *Cockle's* case "there was no evidence of any invitation to alight having been given by any of the defendants' servants," though this was qualified by the fact that it was "clear that the train had been brought to a final standstill, as it was not again set in motion until it started on its onward journey."⁴ The Exchequer Chamber held this last fact tantamount to an invitation to alight, "at all events after such a time has elapsed that the passenger may reasonably infer that it is intended that he should get out if he purposes to alight at the particular station;"⁵ and also that, the danger not being "visible and apparent," there was negligence in the company.

The next case is *Lewis v. London, Chatham, and Dover Railway Company*.⁶ The carriage in which the plaintiff was travelling shot a little beyond the platform. The name of the station was called out; the plaintiff, who knew the station well, began to alight, when the train backed into the station; the jerk of the train in backing threw the plaintiff down and injured her, for which injury she sued. The Court of Queen's Bench held her disentitled to recover. "I do not at all agree," said Blackburn, J., "that 'Bromley, Bromley!' meant 'Jump out.' The calling out the name of the station is generally done just as the train is drawing up, and before it has quite stopped; and this is matter

¹ L. R. 7 C. P. 321.² L. R. 7 C. P. at 322.³ L. c. at 326.⁴ 24 L. T. (N. S.) 105.⁵ L. c. at 323.⁶ (1873) L. R. 9 Q. B. 66.

of common knowledge. It is in fact done by way of preparing people to get out."¹

Weller v.
London,
Brighton, and
South Coast
Railway
Company.

Then comes *Weller v. London, Brighton, and South Coast Railway Company*.² On the approach of a train to a station a porter called out the name of the station and the train was brought to a standstill. The plaintiff, a season-ticket holder and accustomed to stop there, not being able to see whether there was a platform or not because it was so dark, seeing another person get out of the next carriage, concluded it was all right, and in attempting to alight was injured; hence the action. "There was no evidence to shew that the stoppage of the train was a temporary one only, or that the train was afterwards backed; but, on the contrary, it seemed to be clear that the train pursued its journey without having been backed."³ The Court of Common Pleas held there was evidence of negligence. For this there seems to have been abundant material: "There was no evidence of any warning to the passengers not to get out, or of any intimation that the train was going to back, but, on the contrary, it afterwards pursued its journey without putting back."⁴ Merely overshooting the platform it was agreed was not negligence,⁵ and Honyman, J., expressed his opinion that the calling out the name of the station would not *per se* be any evidence of negligence. "For," said he,⁶ "I rather agree with my brother Keating in *Cockle v. South-Eastern Railway Company*,⁷ that it amounts to no more than an intimation to the passengers that the train is approaching the station."

Bridges v.
North London
Railway
Company.

This was much considered in the case of *Bridges v. North London Railway Company*, decided a few months after in the House of Lords.⁸ Much of the argument there turned on the effect of calling out the name of a station. The conclusion of the House is expressed by Lord Hatherley, referring to the leading opinion of the Lord Chancellor (Cairns):⁹ "I entirely concur with the views taken of this case by the noble and learned lord on the woolsack, and, concurring with him especially in that part of his observations in which he stated that he thought we were not bound to lay down any special rule as to what the effect of calling out the

Opinion of
Lord
Hatherley.

¹ This passage is from the Law Journal Report, 43 L. J. Q. B. 8, at 12.

² (1874) L. R. 9 C. P. 126.

³ L. c. at 128.

⁴ L. c. per Denman, J., at 133.

⁵ L. c. per Brett, J., at 132: "I also agree that merely overshooting the platform is not negligence." Per Honyman, J., at 134: "I also agree with my Brother Blackburn in *Lewis v. London, Chatham and Dover Railway Company* (L. R. 9 Q. B. 66, at 71), that merely overshooting the platform a little would not *per se* be any evidence of negligence."

⁶ L. R. 9 C. P., at 134.

⁸ L. R. 7 H. L. 213.

⁷ L. R. 5 C. P. 457, at 468.

⁹ L. c. at 240.

name of a station would be, I cannot help observing that when the name of a station has been called out, accompanied by a stoppage, and a considerable interval has elapsed, there is a certain amount of evidence to go to the jury to authorize the finding of a verdict for the plaintiff, unless some explanation could be given of the facts by the defendants, instead of their merely submitting that the plaintiff had not produced sufficient evidence to call upon them for a defence."

Bridges's case is an important one in the series now under con- Facts.
sideration. The injured man, who was very near-sighted, was in the last carriage of a train that arrived at Highbury a few minutes before seven on a night in January, when the tunnel through which the train had to pass to reach the station was filled with steam. The station platform extended into the tunnel for a space, but was narrower than the main platform. Then further in the tunnel there was a short sloping piece of ground; then a heap of hard rubbish lying by the side of the rails, irregular in form and height. The train only went partially up to the main platform. The last carriage but one came opposite the narrower portion in the tunnel; the last carriage was opposite the rubbish. The injured man appeared to have attempted to alight, and to have fallen; from which fall he sustained injuries that caused his death. The evidence shewed that after some of the passengers had got out there was a warning, "Keep your seats!" and the train moved further into the station. Blackburn, J., at the trial, nonsuited, being of opinion that there was no evidence of negligence. The Court of Queen's Bench¹ sustained this ruling, which was affirmed in the Exchequer Chamber by a majority of four to three of the judges there present.² In the House of Lords the judges who were summoned to give their opinions³ were unanimous in favour of reversing the decision of the Courts below. The Lords⁴ were also unanimously in favour of reversing the decision of the Exchequer Chamber; a verdict was accordingly entered for the plaintiff, the widow of the injured man.

"It was not negligence," says the Lord Chancellor,⁵ "to stop the Opinion of
Lord Cairns, C.
train in the tunnel; it was not necessarily negligence not to have a

¹ L. R. 6 Q. B. at 379—Cockburn, C.J., Blackburn, Mellor, and Lush, JJ.—Cockburn, C.J., said "if a rule was granted it would be certain in that court to be discharged, and therefore it was refused."

² L. R. 6 Q. B. 377—Cleasby, Pigott, Channell, and Bramwell, B.B., being for affirming, Keating, Willes, JJ., and Kelly, C.B., for reversing, the decision of the Court of Queen's Bench.

³ Pollock, B., Denman, Brett, Keating, JJ., and Kelly, C.B.

⁴ The Lord Chancellor (Cairns) and Lord Hatherley. Lord Colonsay heard the argument, but died before judgment was given.

⁵ L. R. 7. H. L. at 238.

platform in the tunnel. But the question, and the only question in the case, appears to me to be this—Was there evidence to go to the jury that in this state of things the company or its servants so conducted themselves as to lead to the deceased getting out of the carriage at the time that he did get out?" This question the House of Lords answered in the affirmative. Not, as we have seen, because the name of the station was called out, but because, first, "the train having actually stopped;"¹ secondly, "the servants of the company having called out 'Highbury!'"² thirdly, "the requisite time having elapsed for any of the passengers to get out and leave the carriage;"³ fourthly, the admission by the subsequent cry of "Keep your seats!" that the previous call of the name of the station "was an invitation to leave the seats."

Robson v.
North-Eastern
Railway
Company.

Robson v. North-Eastern Railway Company³ was a case where the station at which the injury to the plaintiff occurred was a very small one, the platform short, and the station-master the only servant kept there. On the arrival of the train in which the plaintiff was a passenger, the carriage in which she was riding was carried past the platform. When the train stopped, the plaintiff rose, opened the door, and stepped on the iron step of the carriage. She looked to see whether there were any railway servants about; she saw the station-master taking luggage out of the van, but did not see the guard; getting frightened that the train would move away, she tried to alight by getting on the foot-board, her foot slipped, she fell by the side of the carriage and thus sustained the injury for which the action was brought. The Court of Appeal were of opinion that she could recover, and distinguished the case from Siner's case, on the ground that there the plaintiff, without looking for assistance, elected to face the apparent circumstances, and to alight as best she could; while in the present case the plaintiff waited for assistance, till, afraid of the train moving on, she ventured to alight. The question for the jury was, whether the acts which induced such a state of mind as led to the consequences indicated a failure of duty on the part of the defendants.³

¹ L. c. at 239.

² (1876) 2 Q. B. Div. 85. A remark of Mellish, L.J.'s, goes to shew that there is no absolute obligation to provide a platform for passengers to alight at. At 88 he says: "It is clearly the law that railway companies are bound to find reasonable means for passengers to alight at every station at which they choose to stop. The plaintiff here was invited to alight, and the fact of the carriage being beyond the platform affords some evidence that she could not get out without assistance and exposing herself to some danger." In Wharton v. Lancashire and Yorkshire Railway Company, 5 Times L. R. 142 (C. A.)—evidence of platform being too far below the first step of the carriage was held evidence that the railway company had not provided reasonable facilities for alighting.

³ The judgment of Brett, J.A., appears to be very incorrectly given in the Law

*Rose v. North-Eastern Railway Company*¹ was "more than covered" by Robson's case. Nevertheless the Court of Exchequer nonsuited, but the Court of Appeal entered a verdict for the plaintiff. The portion of the train in which the plaintiff was carried overshot the platform; a clerk and porter attending to the train called out to the passengers to keep their seats; the plaintiff did not hear the call, and, after waiting for some little time, seeing the passengers in the other carriages getting out, she got out of the carriage, and in so doing fell to the ground and was injured. The plaintiff lived near the station, and admitted that on previous occasions, when some of the carriages had overshot the platform, the train had been backed to allow passengers to alight. Kelly, C.B., in the Court of Exchequer, said² the "fair inference on the whole case is, that unless the passengers in the foremost part of the train had all got out without waiting for the train to back, it would have been put back in order that they might alight in safety," and that to have left the case to the jury upon the question of negligence "would have been greatly straining the principles of justice as applicable to cases of this nature." Cleasby, B., concurred with Kelly, C.B., distinguishing Robson's case, as on the ground that in the present case³ "there was a calling out by the porters that the passengers were to keep their seats, and that on other occasions the train, when it had overshot the platform, had been put back." In the Court of Appeal, Cockburn, C.J., was of opinion⁴ that it was "the clearest of all possible cases." "It is not enough that the train has come to a standstill, and the porters call out 'Keep your seats!' unless the train is afterwards backed, or something is done." The view of Cockburn, C.J., thus seems to be that the evidence of negligence of the railway company was the fact that the train was not backed at all; so that had the plaintiff kept her seat she might have been carried on.⁵

*Rose v.
North-Eastern
Railway
Company.*

*Opinion of
Kelly, C.B.*

*Opinion of
Cockburn, C.J.,
in the Court of
Appeal.*

Reports, especially the sentence "The House of Lords held," &c. In the Law Journal report, 46 L. J. Q. B. 50, at 52, there is to be found a more accurate summary; so also of Lord Coleridge's judgment.

¹ 2 Ex. Div. 248.

² L. c. per Amphlett, J.A., at 252.

³ L. c. at 249.

⁴ L. c. at 250.

⁵ There is an elaborate judgment of Bradley, J., examining the American cases on the law of the duty of a railway company to provide means for their passengers safely alighting, in *Ostran v. New York Central Railroad Company*, 35 Hun (N.Y.) 590. See also *Terre Haute and Indianapolis Railroad Company v. Buck*, 49 Am. R. 168. Failure to stop long enough for passengers to alight is held a breach of duty in *Washington and Georgetown Railroad Company v. Harmon's Administrator*, 147 U. S. (40 Davis) 571. *Roe v. Glasgow and South-Western Railway Company*, 17 Rottie 59, is an extraordinary decision holding that a claim based on the negligence of a railway company in insufficiently lighting a station whereby a passenger was induced to get out of a moving train, believing it had stopped sufficiently, disclosed a cause of action to go to a jury. Lord Young dissented, considering that "if there was great darkness, that demanded all

Cases compared and considered.

The result of this examination shews that though the list of cases we have been considering undoubtedly reveals divergences of judicial opinion, there is yet no absolute conflict of authority amongst them. The dividing line between some of the cases may be fine, and the judicial tendency in the later certainly differs considerably from that shewn in the earlier cases; still it cannot be said that the effect of the later is to overrule the earlier decisions. For example, to compare *Harrold v. Great Western Railway Company*¹ with *Rose v. North-Eastern Railway Company*² there is little doubt that the tendency of the judges in the earlier case was lenient towards the railway company; while the leaning of the judges in the later case was towards the plaintiff; yet the ground of the earlier decision is that the plaintiff, without an invitation to alight, and without waiting to see whether the train would be backed, chose to get out; while the decision in the later case is that though the plaintiff waited, yet the company's men did nothing to obviate inconvenience and danger. The result is the same of any other of the cases we may choose to compare. It seems then that the cases most in favour of the companies and those most in favour of plaintiffs are yet decided on principles which, when compared, are reconcilable and consistent.

Siner v. Great Western Railway Company.

The case that of all these has been submitted to the most searching criticism (*Siner v. Great Western Railway Company*³) may perhaps be most unassailably rested on the second ground of *Montague Smith, J.'s*,⁴ judgment—that of contributory negligence. The rule applicable is stated by Lord Hatherley in *Dublin, Wicklow, and Wexford Railway Company v. Slattery*:⁵ “If such contributory negligence be admitted by the plaintiff or be proved by the plaintiff's witnesses while establishing negligence against the defendants, I do not think there is anything left for the jury to decide, there being no contest of fact.” This is approved by Lord Watson in *Wakelin v. London and South-Western Railway Company*.⁶

Lord Hatherley's statement in Dublin, Wicklow, and Wexford Railway Company v. Slattery.

Washington, &c. Railroad Company v. Harmon's administrator.

In a very useful American case—*Washington, &c. Railroad Company v. Harmon's Administrator*⁷—the duty of a passenger the more care.” It seems scarcely credible that an action should be maintainable for injuries sustained from getting out of a moving train by the allegation that the place where the pursuer chose to get out was so dark that he did not see the train was in motion. For the Canadian law, see *Quebec Central Railway Company v. Lortie*, 22 Can. S. C. R. 336.

¹ 14 L. T. (N. S.) 440.

² 2 Ex. Div. 248.

³ L. R. 4 Ex. 117.

⁴ L. c. at 124.

⁵ 3 App. Cas. 1155, at 1169. Cp. *Nolan v. Brooklyn, &c. Railroad Company*, 41 Am. R. 345, the head note of which is: “It is not necessarily negligent for a passenger to ride on the front platform of a street car;” and see the note at 347.

⁶ 12 App. Cas. 41, at 48.

⁷ 147 U. S. (40 Davis) 571.

carrier is expressed to be¹ "to safely carry and deliver the passenger, and in so doing not only to provide safe and convenient means of entering and leaving the cars, but to stop when the passenger was about to alight and not to start the car until he had alighted." The passenger consequently has "a right to assume that the car would actually stop to allow him to get off,"² and since the right to start depends on the passenger being off the step, the fact that the passenger is on the step when the car starts cannot, in itself, be contributory negligence.

Here also may be noted a case, *Willoughby v. Horridge*,³ dealing with the liability of the lessees of a ferry who provided steamboats for the conveyance of passengers' goods and cattle, and also steps for landing. They were also held liable for an injury sustained by the horse of a passenger in consequence of the side rail of the landing slip (of the dangerous state of which they had been forewarned) giving way, even though the horse at the time was under the control and management of the owner. On appeal *Walker v. Jackson*⁴ was relied on by the appellant, and was distinguished by Maule, J., because "substantially this is an action against the defendants for negligence in providing an insufficient slip—or, rather in permitting it to be used after they had notice of its unfitness." In the result the Common Pleas dismissed the appeal. The ground of their decision being thus stated by Jervis, C.J.: "It is not enough for them (the lessees the appellants) to convey passengers and goods across the river, unless they also bridge over the intervening space between the vessel and the landing-place. They are as much bound to furnish a safe slip for that purpose, as to furnish a safe vessel to cross the river." That is, the duty of a carrier of passengers is not limited to the mere act of carrying but extends to all the incidents attending the safe reception and the safe discharge of passengers.

Willoughby v. Horridge.

Ground of the decision stated by Jervis, C.J.

The legal principles involved in the constitution and proof of contributory negligence have been already examined,⁵ and need be only referred to here; there are, however, some special developments that require to be noted arising out of the exceptional position and dangers of railway passengers.

Special developments of contributory negligence as applicable to railway company.

*Fordham v. London, Brighton, and South Coast Railway Company*⁶ and *Richardson v. Metropolitan Railway Company*⁷

Fordham v. London, Brighton, and South Coast Railway Company, and Richardson v. Metropolitan Railway Company.

¹ *L. c.* at 580.

² *L. c.* at 583.

³ 12 C. B. 742; *Dodge v. Boston and Bangor Steamship Company*, 148 Mass. 207, 12 Am. St. R. 541.

⁴ 10 M. & W. 161.

⁵ *Ante*, 168 *et seqq.*

⁶ (1868) L. R. 3 C. P. 368.

⁷ Reported in the Law Reports in a note to *Fordham's case*, at 374. See, too, *Maddox v. London, Chatham, and Dover Railway Company*, 38 L. T. (N. S.) 458.

were both cases where the plaintiffs respectively were getting into railway carriages, and took hold of the edge of the door to assist them to enter, when the guard forcibly closed the door, and in each case crushed the plaintiff's hand between the door and the doorpost. In the latter case it was proved that before closing the door the porter called out, "Take your seats! Take your seats!" and the plaintiff admitted that he had his hand on the door for half a minute after he had entered the carriage; while in the earlier case "the guard shut the door prematurely before the plaintiff had got completely in."¹ A distinction in the decisions is based on this variation in the facts. In *Fordham's case* the majority of the Court of Common Pleas, and the Exchequer Chamber² unanimously, were in favour of the plaintiff; while in *Richardson's*, in which there was no appeal, the Court unanimously nonsuited the plaintiff, holding that the porter had merely closed the door in the ordinary and proper execution of his duty, and that the accident was solely attributable to the plaintiff's own want of caution. The act done by the passenger in these cases was a lawful act if done properly. In the one case it was held to have been done properly, in the other not properly.

*Adams v.
Lancashire
and Yorkshire
Railway
Company.*

In the next case, *Adams v. Lancashire and Yorkshire Railway Company*,³ where the way of doing the act was not questioned, the contention of the railway authorities was that it should not have been done at all. In the result the Court of Common Pleas came to this conclusion—a conclusion that was afterwards repented of by one of the judges deciding it.⁴ The door of a carriage in which the plaintiff was being carried flew open several times through the lock being defective. There was room in the carriage for the plaintiff to sit away from the door, and the train would have stopped at a station in three minutes. Nevertheless he shut the door three times. The fourth time the door opened

¹ Per Byles, J., at 371.

² L. R. 4 C. P. 619. In *Atkins v. South-Eastern Railway Company*, 2 Times L. R. 94, while the plaintiff was in the act of sitting down, her thumb was in the hinge of the door, and, according to the plaintiff's statement, the porter, who "was coming along and could see her," slammed the door. It was held there was evidence for the jury, leave to appeal being refused. In *Catherall v. Mersey Railway Company*, 3 Times L. R. 508, where the question was whether the plaintiff had put his hand in an unreasonable place, the Court said: "It could not be unreasonable for the plaintiff to put his hand where he did, if he had no reason to expect the porter would act as he did." In *Cohen v. Metropolitan Railway Company*, 6 Times L. R. 146, it was said that the question to be considered was "what would the person whose duty it was to shut the doors reasonably have supposed the position of the plaintiff to be?" and plaintiff was non-suited on the ground that "in the Metropolitan Railway especially persons must be taken not to be leaving their fingers in danger. The plaintiff must shew a clear *prima facie* case that there was something which the person shutting the door had omitted to do."

³ L. R. 4 C. P. 739.

⁴ Per Brett, J., *Gee v. Metropolitan Railway Company*, L. R. 8 Q. B. 161, at 176.

while the plaintiff was endeavouring to shut it, he fell out and was hurt. The negligence of the defendants was undoubted. The jury having found for the plaintiff, leave was given to the defendants to move to enter a nonsuit on the ground that there was no evidence that the accident was caused by their negligence; the Court of Common Pleas ultimately made the rule absolute. The principle on which the case was argued for the plaintiff was that laid down by Lord Ellenborough, C.J., in *Jones v. Boyce*,¹ that if a person be placed by the misconduct of another person in such a situation that he has to adopt one or other course of a perilous alternative, the person whose misconduct occasions the risk is responsible for the consequences of the course that the imperilled person takes. The Court considered that in the present case there was no evidence that the plaintiff was placed in such a situation, or that he was justified in undertaking the peril he voluntarily encountered; and held another principle applicable, that where a person in a position of entire safety voluntarily undertakes an act dangerous in itself in order to obviate a slight inconvenience from which he suffers, any injury he may sustain is not to be attributed to those whose act occasioned the slight inconvenience.

Principle
argued as
applicable.

Principles
applied by the
Court to the
decision of the
case.

Brett, J.'s, comment on this in the Exchequer Chamber, in *Gee v. Metropolitan Railway Company*,² is: "I think that if that case were to come into a court of error, I should be prepared now to say that, although the rule laid down was right, yet its application to the circumstances was wrong." The case as it stands seems to rest on an assumption that the plaintiff "was obviously doing what was dangerous." Something more, then, than shutting a carriage door from the inside while a train is in motion must have been involved, for the Court could never have decided that merely to do this was dangerous; and, when it became a question of the manner of doing it, it would appear to be a question not to be lightly removed from a jury.

Brett, J.'s,
subsequent
expression of
opinion in
Gee v.
Metropolitan
Railway
Company.

However that may be, *Adams v. Lancashire and Yorkshire Railway Company*³ was very greatly discredited in the Exchequer Chamber in *Gee v. Metropolitan Railway Company*.⁴ Plaintiff was a passenger on the Metropolitan Railway, and in the course of the journey got up from his seat, put his hand on a bar that

Gee v.
Metropolitan
Railway
Company.

¹ 1 Stark. (N. P.) 493, at 495. *Ante*, 56.

² L. R. 8 Q. B. 161, at 177. *Warburton v. Midland Railway Company*, 21 L. T. (N.S.) 835, and *Richards v. Great Eastern Railway Company*, 28 L. T. (N. S.) 711, are cases of imperfectly fastened doors. As to the fall of a window into its socket, *Murray v. Metropolitan District Railway Company*, 27 L. T. (N. S.) 762.

³ L. R. 4 C. P. 739.

⁴ (1873) L. R. 8 Q. B. 161; *Hamer v. Cambrian Railway Company*, 2 Times L. R. 508 (C. A.).

Statement of
the principle
applicable by
Kelly, C.B.

passed across the window of the carriage, and leant forward to look out of the window, when the door flew open, and the plaintiff fell out and was injured. The plaintiff having obtained a verdict at the trial, a rule *nisi* to enter a nonsuit was discharged by the Court of Queen's Bench, whose decision was affirmed by the Exchequer Chamber. The principle applicable is thus put by Kelly, C.B. :¹ "Any passenger in a railway carriage, who rises for the purpose either of looking out of the window, or of dealing with, and touching, and bringing his body in contact with the door for any lawful purpose whatsoever, has a right to assume, and is justified in assuming, that the door is properly fastened; and if, by reason of its not being properly fastened, his lawful act causes the door to fly open, the accident is caused by the defendants' negligence."²

Passenger
sitting with
his arm out
of window.

The apparently simple question of whether a passenger is disentitled to recover by reason of contributory negligence for an injury received through sitting with his arm out of window has been the occasion for great divergence in the American decisions.

Pennsylvanian
decisions.

On the one hand, the Pennsylvanian Courts³ have held that the carrier is responsible for injuries received by a passenger in such circumstances, where the road is so narrow as to endanger projecting limbs, unless the windows of the cars are so barricaded with bars as to render it impossible for the passenger to put his limbs outside the window.

Massachusetts
decisions.

On the other hand, the Massachusetts Courts⁴ have adopted the rule that if a passenger's elbow extends through the open window beyond the place where the sash would have been if the window had been shut, the passenger's conduct would indicate such carelessness as to disentitle him from recovering.

Probable
English view.

The point has not arisen in England, where there is no reason to doubt that, should it, the Massachusetts rule would be adopted.

Scotch
decision.

In Scotland no right to recover was held to exist on the part of the representatives of a woman, who, seized by sudden illness, put her head out of the window of a railway carriage and was struck and killed by a mail bag hanging on an apparatus supplied and erected at the side of the railway by the Postmaster-General

¹ L. R. 8 Q. B. at 171.

² In *Dudman v. North London Railway Company*, 2 Times L. R. 365, the Court of Appeal held that there was evidence to go to a jury of negligence in a railway company where two boys were playing in a railway carriage, when the plaintiff, one of the boys, to avoid a blow, jumped up against the carriage door, which flew open, so that he fell out. Cp. the American case of *Peverly v. City of Boston*, 136 Mass., 366, 49 Am. R. 37; and the Scotch case, *Cassidy v. North British Railway Company*, 11 Macph. 341.

³ *New Jersey Railroad Company v. Kennard*, 21 Pa. St. 203.

⁴ *Todd v. Old Colony, &c. Railroad Company*, 89 Mass. 207. See *Dun v. Seaboard, &c. Railroad Company*, 49 Am. R. 388, a Vermont case to the same effect. The point was decided the other way in *Summers v. Crescent City Railroad Company*, 34 La. Ann. 139.

to whom the railway company were bound by statute to give all reasonable facilities for the delivery of mails. The majority of the jury had, however, negatived the claim, and the case must not be stretched to the length of inferring that in all cases a passenger thrusting his head out of window will be disentitled to recover in the event of injury happening to him through doing so. A railway constructed with projections which prevent passengers in any circumstances putting their heads out of the carriage windows and acting in the nature of a trap would probably be held so negligently constructed as to give a passenger injured thereby a right of action in respect thereof. This was pointed out by Lord Adam, who directed the jury,¹ that "by the Act of Parliament the railway company were bound to give all reasonable facilities at their stations to Her Majesty's officers with reference to these matters, and the question came to be, whether, when Her Majesty's Postmaster-General demanded that the railway company should allow the erection of this machine, it was a reasonable facility that they were bound to give; that was the question, I think, for the jury. Now I told the jury that if they thought it was a source of danger to the public, the railway company had no right to allow it to continue where it was, and I told them further that the question was whether the railway company, in giving permission to Her Majesty's Postmaster-General to erect this apparatus, were or were not giving a reasonable facility which they were bound to give, or, in other words, whether the railway company ought to have refused to allow the erection of this apparatus when it was erected some thirty years ago." On the other hand, the same case is an authority for the proposition that there is no duty on a railway company to construct their line so as to afford passengers an unlimited right of lolling out of window.²

Case considered.

Lord Adam's direction to the jury.

Notice should here be taken of a *dictum* of the Lord Chancellor (Cairns) in *Metropolitan Railway Company v. Jackson*, the last of this class of cases it will be here necessary to notice:³ "The officials"—i.e., of a railway company—"cannot, in my opinion, be held bound to prevent intending passengers on the platform opening a carriage door with a view to looking or getting into the carriage."

Railway officials not bound to prevent intending passengers opening the carriage doors to see if there is room.

A passenger is not negligent in not foreseeing movements

¹ *Pirie v. Caledonian Railway Company*, 17 Rettie 1157, at 1165.

² *Pirie v. Caledonian Railway Company* is important for another point which was there considered very fully, viz., the inadmissibility of the evidence of jurymen to shew that the verdict does not correctly express the result at which they have arrived.

³ 3 App. Cas. 193, at 198. Cp. *Camden Railroad Company v. Hoosey*, 99 Pa. St. 492. See also two cases, *Hogan v. South-Eastern Railway Company*, 28 L. T. (N. S.) 271, and *Cannon v. Midland Great Western Railway (Ireland) Company*, 6 L. R. Ir. 199, where accidents happened through unusual crowding on platform.

Passenger not negligent in not foreseeing unusual movements.

which are not common in the business as ordinarily carried on, though with the particular carrier they may be habitual. Thus, in *Gordon v. Grand Street, &c. Railroad Company*,¹ plaintiff, seeing a car coming towards her at the terminus of a tram company, went to enter it, when the car, being transferred from one line to another by means of a moveable slide, her foot was caught and she was seriously injured. As no one without previous knowledge could be expected to provide against the contingency of this side-long movement, a duty of greater care and circumspection was held to be imposed on the company resorting to such a method. "Care," says the learned judge who delivered the judgment of the Court,² "in avoiding danger implies that there is or would be with all prudent persons a sense or something to create a sense, of danger; for if the circumstances are not such as would put a prudent and cautious person upon his guard, the omission to exercise more than ordinary attention is not the negligence which contributes to an accident."

Company not bound to anticipate extraordinary pressure.

As with the provision of railway porters at a station,³ so with the provision of accommodation for passengers a company is not bound to anticipate extraordinary pressure. In a ferry-boat case⁴ where a passenger was injured by being thrown down in the boat consequent on its bumping against a bridge, the negligence alleged against the proprietor of the ferry was that he had not provided seats enough for all the passengers whom he was transporting. But his duty was held to extend no further than to provide seats "customary and sufficient for those who ordinarily preferred to be seated while crossing,"⁵ and till failure in this respect was shewn it was considered that no liability arose.

Loss primarily due to carelessness of a passenger does not affect the company with liability.

A loss primarily due to the carelessness of the passenger will not affect the company with liability where no duty is neglected by them, though their refusal to act on the application of the passenger may be the cause of considerable loss which had else been avoided. Thus a lady passenger, while attempting to shut the window of the carriage in which she was travelling, dropped a bag containing valuables which she had in her hand. The guard refused to stop the train before it arrived at the next station, and in consequence the bag and its contents were lost. The company were sued, but the Court were of opinion that even though no negligence were attributable to the passenger in attempting to shut the window with the bag in her hand yet

¹ 40 Barb. (N. Y.) 546.

² L. c. at 550.

³ *Metropolitan Railway Company v. Jackson*, 3 App. Cas. 193, at 203, that is when no more than ordinary traffic is to be anticipated.

⁴ *Burton v. West Jersey Ferry Company*, 114 U. S. (7 Davis) 474.

⁵ L. c. per Harlan, J., at 476.

the dropping the bag out of the window was not an act the defendants were bound to foresee or guard against; and further that she had no legal right for the purpose of relieving herself from the consequences of her conduct to require them to stop the train short of an usual station to the delay and inconvenience of other passengers and the possible risk of collision with other trains.¹

Considerations such as these greatly assist in solving such a case as *Cobb v. Great Western Railway Company*,² where the plaintiff was robbed while travelling in one of the defendants' trains by a gang of men who had entered the carriage where he was. The plaintiff forthwith complained to the station-master of having been robbed, and he refused to detain the train to permit the plaintiff to give the men into custody and have them searched. The breach of duty as alleged in the statement of claim was that immediately on the plaintiff's complaint being made to the station-master "he negligently and improperly, and in breach of the duty owed by the defendant company to the plaintiff as a passenger on their line, to protect him in person and property, and to oppose no obstacle to his recovering the property whereof he had while on their line been wrongfully deprived, gave the signal for the said train to leave and it left accordingly; and the plaintiff was thereby prevented, without any negligence on his part, from having the said men searched and his aforesaid property recovered." There was another claim based on the company's negligence in allowing the carriage to be overcrowded "and so facilitating the hustling and robbing of the plaintiff." This last may be at once disposed of by reference to the well-recognised principle. "Every one has a right to suppose that a crime will not be committed and to act on that belief," so that a loss arising from a robbery is not a direct and natural consequence of the breach of obligation not to crowd a carriage.⁴ The matter then stands on the footing of the defendants not being held guilty of negligence in respect of anything directly pertaining to the contract of carriage. They were clearly not responsible for the robbery; yet it was further urged they were responsible for doing nothing to recover the proceeds of the robbery. But as Bowen, L.J., points out, there was no allegation of any act done which *hindered* the plaintiff—a line of conduct involving different consequences; the gravamen of the charge was a mere

Cobb v. Great Western Railway Company.

Opinion of Bowen, L.J.

¹ *Henderson v. Louisville and Nashville Railroad Company*, 123 U. S. (16 Davis) 61. In the case of a person falling out of a train it would be otherwise.

² (1893) 1 Q. B. 459, in H. of L. (1894) App. Cas. 419.

³ *Baxendale v. Bennett*, 3 Q. B. Div. 525, per Bramwell, L.J., at 530.

⁴ *Metropolitan Railway Company v. Jackson*, 3 App. Cas. 193.

Opinion of
Lord Esher,
M.R.

refusal to act. To support this it was necessary to shew that the railway company had undertaken to act. Now the duty they undertook was to carry the plaintiff safely, and this duty they had performed. No term can be implied in a contract of carriage to make pursuit of thieves. If then the company, as seems undoubted, were not responsible for the robbery, neither were they bound to make pursuit of the thieves, or to impede the working of their system to aid one of their passengers in pursuing robbers. "Whatever was done to him" [the plaintiff], says Lord Esher, M.R.,¹ "was done and over; the robbery was finished when he complained to the station-master," and the robbery being over without any duty being raised against the company, there was nothing to shew any new duty subsequently constituted. The language of Chalmers, J., in *New Orleans, St. Louis and Chicago Railroad Company v. Burke*,² was urged as meeting the case. But that, as pointed out by Lord Esher, M.R.,³ referred to the duty to protect a passenger whom they had notice was being assaulted by fellow passengers. In the case before the Court the duty asserted was the arrest of those of whose wrong-doing the company had no notice before its completion. In the House of Lords the decision of the Court of Appeal was affirmed⁴ on the ground that, in the words of Lord Selborne,⁵ "taking it in the manner most favourable to the plaintiff, I cannot myself hold that starting the train in the ordinary course was opposing an obstacle to the recovery of the plaintiff's property of such a kind as to make the company responsible in the same way as if their negligence had caused or contributed to the robbery. If it was a duty to give opportunity for the arrest and search of the persons charged with the crime, that was, in my opinion, not a duty of the company to the plaintiff as a passenger on their line, but a duty to public justice, for failure in which, by one of their station-masters or any other person in their employment, the company are not liable in an action for damages."

Chalmers, J., in
New Orleans,
St. Louis and
Chicago Rail-
road Company
v. Burke.

On the important matter of the right and duty of the officers of a railway to preserve order thereon, some extracts may be made from the admirable judgment of Chalmers, J., in the above cited case of *New Orleans, St. Louis and Chicago Railroad Company v. Burke*. If, says the learned judge,⁶ an officer of a railway in charge of a train "sees one passenger making upon another an assault, unprovoked at the time, he may command the peace, and without regard to the merits of the quarrel compel it, if necessary, by an ejection of the unruly party. In so doing he

¹ (1893) 1 Q. B. at 463.

² (1893) 1 Q. B. at 461.

³ *L. c.* at 425.

⁴ 24 Am. R. 689.

⁵ (1894) App. Cas. 419.

⁶ 24 Am. R. at 695.

decides nothing as to the merits of the quarrel and will no more be liable for an honest and impartial mistake than a police officer would be under similar circumstances. . . . But if he may do this voluntarily at his option, is he not compelled to do it when requested by those for whose benefit the power has been conferred upon him? Powers and duties are usually reciprocal, and may be said to be uniformly so when the power is of a public, official character conferred for the benefit of others. The failure or refusal of the official to exercise such a power in a proper case, when called upon by those for whose protection he has been invested with it, amounts to negligence or to wilful misconduct as the circumstances of the case may indicate.¹ . . . We conclude then, that the undoubted power which is vested in railroad officials to preserve peace and good order on their trains, and, if necessary for this purpose, to eject therefrom turbulent and disorderly persons, carries with it the absolute duty to exercise the power, when called on so to do in a proper case, by the other passengers; that a failure to discharge this duty stands, to some extent, upon the same footing as the omission to perform any other official duty, and upon the maxim, *Respondeat superior*, renders the Corporation liable."

The principles thus forcibly enunciated, though without direct bearing on *Cobb v. Great Western Railway Company*, are in direct opposition to those which prevailed in *Pounder v. North-Eastern Railway Company*,² and if correct discredit that decision. In *Pounder v. North-Eastern Railway Company* the question raised was whether there is a duty on a railway company to use the means they have available for the safeguarding a passenger after receiving notice of a danger likely to happen to such passenger while actually travelling on their line, notwithstanding that the danger to which he is exposed arises from circumstances peculiar to him personally, and is not communicated to the railway company till *after* the passenger has taken his ticket. A Divisional Court (Mathew and Smith, JJ.) held there was no such duty, because the duty of a railway company to its passengers "arises out of the contract, and must be determined upon the facts known to the contracting parties at the time of the making of the contract."

¹ That in England the servants of a railway company have power and also a duty to preserve order, is clear from *Jackson v. Metropolitan Railway Company*, 3 App. Cas. 193. That where there is a power there is also an absolute duty to exercise the power when called on by those entitled to the benefit of its exercise, is also plain: *Julius v. Bishop of Oxford*, 5 App. Cas. 214. See per Lord Blackburn, at 244: "The enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right."

² (1892) 1 Q. B. 385.

Pounder v. North-Eastern Railway Company.

The County Court judge, from whose decision, holding the plaintiff entitled to recover for injuries received through the company's neglect to discharge this alleged duty, the appeal was brought, found that the plaintiff had taken his ticket in the ordinary way, and that at the time the railway company's servants were unaware of any special circumstances connected with him. The plaintiff, however, was very odious to the pitmen of the district, and in danger of molestation from them, and finding a number of them on the platform he sought to avoid them by riding in the guard's van. This he was not allowed to do, and was placed by a servant of the company with two companions in similar case to himself in one of the ordinary compartments. A number of pitmen, unrestrained by the company's servants, pushed in, and during the journey to the first stopping-place assaulted the plaintiff. There their places were taken by others, and similar assaults were committed. At each station the defendants' servants were informed of the assaults, and were requested to put the plaintiff in a separate compartment, but they refused to interfere.

Obligation of the railway company to the plaintiff.

On these facts it is obvious that the plaintiff's contract with the railway company was the ordinary contract to carry safely;¹ and the duty they thus undertook is unvarying in the case of all passengers.² The circumstance then that one passenger needs exceptional protection will not deprive him of all right to protection. But in the case under discussion the defendants refused to use the means of protection at their disposal, which would, for all that appears, have been sufficient to protect an ordinary passenger, because the particular passenger invoking their protection had some special incidents attaching to him; that is, if the company had known less about him they would have protected him, but because they knew more they refused him the ordinary means they had available.

Mathew, J.'s reasoning.

Yet Mathew, J., does not rest his opinion on merely general reasoning. "The principle," he says,³ *i.e.*, the principle that the duty of a railway company to their passengers rests only on the contract entered into between the railway company and their passengers, and which contract must further be taken to provide against only those matters "in the contemplation of the parties when the contract of carriage was entered into," "is very clearly illustrated by two very familiar cases: *Readhead v.*

¹ "If," says Lord Campbell, C.J., in *Collett v. London and North-Western Railway Company*, 16 Q. B. 984, at 989, "they" (*i.e.*, the railway company) "are bound to carry they are bound to carry safely." *Cp. Rose v. Hill*, 2 C. B. 877.

² *Ante*, 1165.

³ (1892) 1 Q. B. at 390.

Midland Railway Company,¹ and *Daniel v. Metropolitan Railway Company.*"²

The point actually decided in the former of these cases is that Examined.

the duty of a carrier of passengers is to take "due care;"³ and Readhead v. Midland Railway Company.

"due care" does not include the liability to make reparation for a disaster arising from a defect in machinery "which no human skill or care could have prevented or detected"⁴—not merely at

the time of making the contract, but at any time previous to the injury. In the latter the point is that when a railway company has

notice that dangerous work is being carried on by responsible Daniel v. Metropolitan Railway Company.

persons about their line, and "extraneous altogether to the work in which they are engaged," they are not bound to anticipate such persons failing in their duty. These two cases, then, afford

little direct support to the principle they are vouched to illustrate. But more, they contain statements of law actually

subversive of it. Thus, in *Daniel v. Metropolitan Railway Company*⁵ Lord Hatherley, C., describes the duty of a railway company to their passengers as follows: "I apprehend that all Lord Hatherley, C.'s, dictum in Daniel v. Metropolitan Railway Company

that is to be done by those who carry passengers for hire is, that they are bound to see that everything under their own

control is in full and complete and proper order. They are bound to see, also, if there be a certain and definite risk as to

which they have any knowledge, or can reasonably be supposed to have any knowledge, that it is sufficiently guarded against. For

instance, a trench may be dug across a road through no fault of theirs, and in such a case they could not be held liable; but if

there is any reasonable ground for apprehending that extraordinary precaution is wanted, they would be liable." If, then, the railway company have means of averting an extraordinary danger,

they are bound to use those means;⁶ if not, the fact that the danger was extraordinary exonerates them. In the case under

examination it may be noted that the extraordinary circumstance was the antipathy of pitmen against a man, who, for all that appears,

was blameless except that he was a link in the chain of enforcing the law. Moreover Mellor, J., in giving the considered judgment of

the Court of Queen's Bench in *Readhead v. Midland Railway Company*,⁷ deals a blow at the proposition that the duty to the plaintiff Proposition in the judgment of the Court of Queen's Bench in Readhead v. Midland Railway Company.

arises "only" on the contract. He says: "The responsibility, both of common carriers of goods for hire, and of common carriers of passengers for hire, notwithstanding some important differences

¹ L. R. 2 Q. B. 412, L. R. 4 Q. B. 379.

² L. R. 5 H. L. 45.

³ L. R. 4 Q. B. at 393.

⁴ *Ibid.*

⁵ L. R. 5 H. L. at 55.

⁶ *Pittsburgh, &c. Railway Company v. Hinds*, 53 Pa. St. 512.

⁷ L. R. 2 Q. B. 412, at 421; see also 423.

conductor directed or advised a passenger to get on or off a car while moving at a moderate pace, and the passenger, acting on the advice, fell and was injured, the passenger would not be disentitled by reason of his act.¹ And so in other cases that may be put; the mere act may be indifferent, and the complexion is put upon it by the circumstances.

Passenger on tramcar.

In travelling on a tramcar it is the duty of the passenger to place himself in a safe position in that portion of the car set apart for passengers. It is no excuse for his placing himself in an unsafe or unusual position that the driver or the conductor does not dislodge him therefrom when the unsafeness is known to the passenger. Thus riding on the foot-board of a car is not a proper place for passengers, and obviously less safe than a seat inside. If the passenger makes reasonable efforts to get inside the car, and fails to do so, and is in these circumstances permitted to ride on the platform, he is not unlawfully there; as where the conductor takes his fare in that position when it is impossible for him to get another place; then in the event of injury he can recover, but probably not before payment of his fare if he has taken his place without the knowledge of the conductor.² A tram company will be held liable for injury resulting from a drunken man being allowed on the car by the conductor.³ "What," says Lord Ashbourne, C.,⁴ "is the duty of the conductor when an intoxicated man tries to force his way into a tramcar? To keep him out. If he tries to force his way whilst the tramcar is in motion—what is his duty? . . . Is it not his duty, avoiding reckless and intemperate action, to use all fair efforts to keep him out?"

Tram conductor kicking boy off street car.

Where the conductor of a street car, kicking at a boy trespassing on the platform of a car caused him to jump off the car and

¹ Shearman and Redfield, *Negligence* (4th ed.), § 520; *Filer v. New York Central Railroad Company*, 49 N. Y. 42, 59 N. Y. 351, 68 N. Y. 124; *Pennsylvania Railroad Company v. Kilgore*, 32 Pa. St. 292; *Burrows v. Erie Railway Company*, 63 N. Y. 556.

² *Clark v. Eighth Avenue Railroad Company*, 36 N. Y. 135; *Caldwell v. Murphy*, 1 Duer (Sup. Ct. N. Y.) 233 (where a passenger was on the top of an omnibus where there were seats for passengers provided); *Keith v. Pinkham*, 43 Me. 501, where it is said: "It may be true that the plaintiff by riding outside, incurred the peculiar risks, if any there were, arising from his exposed situation. But that is all. He did not assume those resulting from the negligence of the defendant." See also *Camden and Atlantic Railroad Company v. Hoosey*, 99 Pa. St. 492.

³ *Murgatroyd v. Blackburn and Over Darwen Tram Company*, 3 Times L. R. 451; *Delany v. Dublin United Tramways Company*, 30 L. R. Ir. 725, *ante* 165. As to what is an "impending danger" from a tram-engine, *Downing v. Birmingham and Midland Trams*, 5 Times L. R. 40. In *Annand v. Aberdeen District Tramways Company*, 17 Rettie 808, a tramway company was held liable for the negligence of the driver of a tramcar going on, before a woman with a clothes-basket on the front of the car, and who was allowed to have it there by the regulations of the company, had time to remove it.

⁴ *Delany v. Dublin United Tramways Company, Limited*, 30 L. R. Ir. 725, at 743.

fall before another car, whereby he was injured, the company was held liable to answer.¹ The starting of a car while a passenger is alighting is *prima facie* evidence of negligence.²

The duty of a tram-car driver is, so it is said in an American case,³ "to keep entire control of his team as far as practicable; to be in a position to speedily apply the brake; and to be vigilant in observing the track, so as to enable him, as far as practicable, to avoid inflicting injury upon others." But this must not be taken as exhaustive.

With regard to persons injured by an accident on a railway, the Regulation of Railways Act, 1868,⁴ makes two important provisions. The first,⁵ which is rarely resorted to, enables the Board of Trade, upon the application in writing of the company from whom compensation is claimed, and the person claiming compensation if he is injured, or his representatives if he is killed, to appoint an arbitrator who shall determine the claim to compensation. The second,⁶ which is constantly made available, provides for the making an order that the person injured may be examined by a "duly qualified medical practitioner named in the order and not being a witness on either side." Outside this enactment there appears to be no power to order an examination of a person injured⁷ and whose injuries are the subject of legal proceedings; though the strong comment that a refusal to submit to examination would elicit at the trial is a considerable safeguard against the want of such a power working practical injustice.

Duty of a tramcar driver.

Regulation of Railways Act, 1868, two provisions.
I. Arbitrator to determine claim to compensation.
II. Order for personal examinations.

Passengers' Luggage.

The liability of common carriers of passengers for the luggage of their passengers remains to be considered.

The law on this subject seems to have undergone a complete revolution. In the earliest cases it was twice held by Holt, C.J., that carriers of passengers were not liable for the luggage of their passengers, unless a distinct price was paid for it.⁸ These

Early law. Carriers of passengers were not liable for luggage.

¹ *M'Cann v. Sixth Avenue Railroad Company*, 117 N. Y. 505, 15 Am. St. R. 539. Cp. *Biddle v. Hestonville, &c. Railway Company*, 112 Pa. St. 551. The contract of carriage terminates so soon as the passenger of his own accord leaves the car, *Central Railway Company v. Peacock*, 9 Am. St. R. 425.

² *Birmingham Union Railway Company v. Hale*, 24 Am. St. R. 748.

³ *Mangam v. The Brooklyn Railroad Company*, 38 N. Y. 455, at 456.

⁴ 31 & 32 Vict. c. 119.

⁵ By sec. 25.

⁶ By sec. 26.

⁷ The English common law is exhaustively considered in *Union Pacific Railway Company v. Botsford*, 141 U. S. (34 Davis) 250, where it is decided that a Court of the United States cannot order a plaintiff in an action for injury to the person to submit to a surgical examination before the trial. See also *Alabama, &c. Railroad Company v. Hill*, 30 Am. St. R. 65, where an examination was had.

⁸ *Middleton v. Fowler*, 1 Salk. 282; *Upshure v. Aidee*, 1 Com. R. 25.

decisions were probably due to the requirements of the mode of carriage in use in the time of Holt, C.J.¹

View of the
law taken in
Robinson v.
Dunmore.

In *Robinson v. Dunmore*,² the result was otherwise; for there, Chambre, J., held that "if a man travel in a stage-coach and take his portmanteau with him, though he has his eye upon the portmanteau yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau is lost," which, says Willes, J., in *Talley v. Great Western Railway Company*,³ "has been considered by eminent authorities to be in general equally applicable to railway carriages." The contract, however, was a special contract to "carry safely." Besides this, the fact that a passenger *sees* his luggage by no means argues that he has undertaken to look after it. Indeed, from certain places in coach travelling it would be impossible to avoid seeing luggage entirely in the charge of the carrier.⁴

Macrow v.
Great Western
Railway
Company.

In *Macrow v. Great Western Railway Company*⁵ the law had changed completely round; for there Cockburn, C.J., says: "The law, however, is now too firmly settled to admit of being shaken, that the liability of common carriers in respect of articles carried as passengers' luggage is that of carriers of goods as distinguished from that of carriers of passengers."⁶ In *Cohen v. South-Eastern Railway Company*⁷ again, the Court of Appeal decided that a passenger's luggage is "articles, goods, or things" within the Railway and Canal Traffic Act 1854.⁸

What is
personal
luggage?

This liability for personal luggage must obviously be limited by some ascertainable bounds. Nearly all the railway companies in their Acts have provisions limiting the weight and the bulk of the luggage that they are compelled to carry; but within the limits thereby marked out there have often occurred occasions of controversy. These are cited in the argument in *Hudston v. Midland Railway Company*,⁹ where the inquiry was what is "ordinary luggage"—the words of the company's private Act—of a first-class passenger who was, by the regulations of the company, varying the wording of the company's private Act, allowed to carry "112 lbs. of personal luggage" free of charge. "The statute," says Lush, J.,¹⁰ "speaks of 'ordinary luggage'; it

Hudston v.
Midland
Railway.

Ordinary
luggage.

¹ Per Mellish, L.J., *Cohen v. South-Eastern Railway Company*, 2 Ex. Div. 253, at 258.

² 2 B. & P. 416, at 419.

³ L. R. 6 C. P. 44, at 50.

⁴ *Cp. Hannibal Railroad v. Swift*, 12 Wall. (U. S.) 262.

⁵ L. R. 6 Q. B. 612, at 618; *Dixon v. Richelieu Navigation Company*, 15 Ont. App. 647.

⁶ See *Munster v. South-Eastern Railway Company*, 4 C. B. N. S. 676; *Williams v. Great Western Railway Company*, 10 Ex. 15.

⁷ 2 Ex. Div. 253, overruling *Stewart v. London and North-Western Railway Company*, 3 H. & C. 135.

⁸ L. R. 4 Q. B. 366.

⁹ 17 & 18 Vict. c. 31, s. 7.

¹⁰ L. c. at 370.

must have been intended that the passenger should be allowed to carry something more than that which he requires for his own personal use and convenience. The only definition I can think of, and one which is sufficient for this case, is, that the words of the statute describe a class of articles which are ordinarily or usually carried by travellers as their luggage. That definition must also be taken to apply to the company's regulation, because, when the company were fixing the description of goods for which they would consider the passenger had paid the carriage when he paid for his ticket, they must have had regard to the usual habits of mankind, and to that description of goods which is usually carried by passengers travelling."¹

The change in the mode of travelling from coach to railway has carried with it an extension of the rights of the traveller in relation to baggage proportioned to the increase of space and power available. Parliament has fixed the minimum limit of luggage that is to be allowed in the case of railway carriers, but there is no such statutory limit with regard to stage-coaches; however, the less room there is on those conveyances for luggage necessarily lessens the amount the carrier is compelled to carry for each individual passenger. Still, the test applicable in the case of luggage loaded on a stage-coach need not, and probably does not, differ from that which is applied in the case of a railway passenger. Regard must be had to the usual habits of mankind, the object and length of the journey, and to the description of goods which are usually taken by passengers of similar rank when travelling in that way. In addition, regard must be had to the capacity of the conveyance, and the number of persons who may reasonably be expected to avail themselves of its convenience for luggage. As there is no statutory obligation on the part of a stage-coach proprietor to carry luggage, the terms of his profession may possibly be such that he declines to carry any. Whatever these terms may be, assuming that they are

Passengers' rights extended by the development of railway travelling.

¹ In *Cahill v. London and North-Western Railway Company*, 13 C. B. N. S. 818; and in *Belfast Railway Company v. Keys*, 9 H. L. C. 556, merchandise for sale has been held not "personal luggage"; so in *Phelps v. London and North-Western Railway Company*, 19 C. B. N. S. 321, were deeds and money of a client carried by a solicitor. In the argument are collected a number of cases deciding what is and what is not luggage, 19 C. B. N. S. at 326. "That which one traveller," says Erle, C.J., in the last cited case, at 330, "would consider indispensable would be deemed superfluous and unnecessary by another. But the general habits and wants of mankind must be taken to be in the mind of the carrier when he receives a passenger for conveyance." In *Hudston v. Midland Railway Company*, L. R. 4 Q. B. 366, a spring-horse; a quantity of sheets, blankets, and quilts, in *Macrow v. Great Western Railway*, L. R. 6 Q. B. 612; pencil sketches of an artist, in *Mytton v. Midland Railway Company*, 4 H. & N. 615; a reasonable quantity of tools for a working watchmaker, *Kansas, &c. Railroad Company v. Morrison*, 55 Am. R. 252; an invalid chair, in *Cusack v. London and North-Western Railway Company*, 7 Times L. R. 452, were held not "personal luggage." See also *Bruty v. Grand Trunk Railway Company*, 32 Upp. Can. Q. B. 66.

sufficiently communicated to intending passengers, they are binding.¹

Onus of proving suitability of goods on the plaintiff.

The *onus* of proving that the goods carried are ordinary and personal luggage is on the plaintiff;² though in the absence of conduct on the part of the passenger misleading the carrier as to the value of his baggage, the Court cannot lay down as matter of law that the mere failure of the passenger unasked to disclose the value of his baggage is a fraud upon the carrier which will defeat all right of recovery.³

When in the custody of the carrier luggage does not differ in the amount of care it demands from ordinary merchandise.

Ordinary or personal luggage, then, when in the custody of the carrier, is regarded in the same light as goods entrusted to a common carrier. But, first, the passenger may exercise control over the luggage during the time of its conveyance; secondly, the luggage claimed to be conveyed may be of a different character from ordinary or personal luggage as it has just been defined; and, thirdly, the luggage may not come into or pass from the custody of the carrier in his capacity of carrier; so that the circumstances of its possession may impose different obligations from those that attach to it if in the possession of the carrier as carrier.

Three cases of variation from the rule. I. Where the passenger exercises control. Le Conteur v. London and South-Western Railway Company.

These three headings we shall now consider in their order.

First: The passenger may exercise control over the luggage during the time of its conveyance.

In *Le Conteur v. London and South-Western Railway Company*,⁴ the plaintiff, who had just landed at Southampton from the Jersey boat, and who was to be carried to London, went with a chronometer in his hand to a railway carriage going to London, and gave the chronometer to a porter of the defendant, who then, in the presence of the plaintiff, placed it on the seat of the carriage. Both the porter and the plaintiff immediately after this left the platform together, the porter to attend to his other work and the plaintiff to see after the rest of his luggage. When the plaintiff returned in a few minutes the chronometer had gone, and was not recovered. "It is not," said Cockburn, C.J.,⁵ "because the article that is part of the passenger's luggage to be conveyed with him is by the joint consent of the passenger and the company, placed in a carriage with him, that the company are necessarily released from their obligation to carry safely. Nothing could be more inconvenient than that the practice

Judgment of Cockburn, C.J.

¹ *Hannibal Railroad v. Swift*, 12 Wall. (U.S.) 262; *Railroad Company v. Fraloff*, 100 U. S. (10 Otto) 24.

² *Elwell v. Grand Junction Canal Company*, 5 M. & W. 669.

³ *Railroad Company v. Fraloff*, 100 U. S. (10 Otto) 24.

⁴ L. R. 1 Q. B. 54. *Leach v. South-Eastern Railway Company*, 34 L. T. (N. S.) 134; *London and South-Western Railway Company v. James*, L. R. 8 Ch. 241.

⁵ L. R. 1 Q. B. at 59.

of placing small articles, which it is convenient to the passenger to have with him in the carriage in which he is about to ride should be discontinued; and if the company were, from the mere fact of articles of this description being placed in a carriage with a passenger, to be at once relieved from the obligation of safely carrying such articles, it would follow that no one who has occasion to leave the carriage temporarily would be able to have them with him with any degree of safety. I cannot think, therefore, we ought to come to any conclusion, which would relieve the company under such circumstances from the obligation, as carriers, to carry the luggage safely, which, for general convenience, ought certainly to attach to them. I cannot help thinking, therefore, we ought to require very special circumstances indeed, and circumstances leading irresistibly to the conclusion that the passenger takes such personal control and charge of his luggage as to altogether give up all hold upon the company, before we can say that the company, as common carriers, would not be liable in the event of the loss."

The expressions here made use of are very strong, but it must Considered. be borne in mind that they proceed on an assumption of fact that the passenger has not so acted as wholly to release the railway company; and that the railway company has been guilty of negligence, while still owing a duty to the plaintiff in respect of the supervision and care, as contradistinguished from the conveyance, of his luggage. On these assumptions the law is unquestionable; and the rule that Cockburn, C.J., lays down, that the *onus* of proving a discharge from the duty as common carriers should lie strongly upon the carrier, is founded in sound sense and right principle. Whether the facts to which the principle was applied in this case were facts which warranted the inference is another and more doubtful matter; but it must be remembered, in criticizing the case, that the postulate for the right understanding of it is, that the porter had been guilty of a negligent act, which, in the circumstances supposed—of the passenger still holding the company to a portion at least of their duty of supervision—fixed them with liability.

Talley v. Great Western Railway Company¹ presents very Talley v. Great Western Railway. similar facts, with the omission of the one fact of want of due diligence on the part of the defendants or their servants, and the additional finding of negligence on the part of the plaintiff; which, as explained by Willes, J.,² could not accurately be called contributory negligence, "all the negligence having flowed from one source, viz., the conduct of the passenger."

¹ L. R. 6 C. P. 44.

² L. c. at 52.

Facts.

The plaintiff, a passenger by the defendants' railway, had his portmanteau put into the same carriage with him. At a suitable point in his journey he left the carriage for refreshments. Upon returning to the train he failed to find his carriage, and completed his journey in another. On subsequently regaining possession of his portmanteau, he found that a portion of its contents had been stolen. Willes, J., in delivering the judgment of the Common Pleas, did not appear to think the complexion of the facts, where luggage is placed in a carriage with a passenger, warranted the inference that Cockburn, C.J., drew from them in *Le Conteur's case*. "It is obvious at least that with respect to articles," says he,¹ "which are not put in the usual luggage van, and of which the entire control is not given to the carrier, but which are placed in the carriage in which the passenger travels, so that he and not the company's servants has de facto the entire control of them whilst the carriage is moving, the amount of care and diligence reasonably necessary for their safe conveyance is, in fact, considerably modified by the circumstance of their being during that part of the journey in which the passenger might, under ordinary circumstances, be expected to be in the carriage intended by both parties to be under his personal inspection and care."

Willes, J.'s,
judgment.

Discussed.

The terms in which this is expressed seem chosen with reference to *Le Conteur's case*, and in order to cover the expressions there used while taking a view not perfectly coincident with the view there taken. The decision in *Le Conteur's case* involved a duty on the part of the company to protect the property till the passenger took charge of the goods in the place he had chosen for them. Willes, J., is content to assume that this is so; though why it should be so may be (apart from a decision to be noted presently) a difficult matter to explain. The distinction he takes is that in *Talley's case*, if the passenger kept the portmanteau to go with him, he was not excused (there being no negligence on the railway's part) if he did not go with it. And having occupied his seat for a part of the journey, there was no act on the company's part interfering with his occupancy all through. As he had chosen to remove his goods from the sole charge of the company as common carriers, and, to place them in a situation he himself had chosen, in which he had unreasonably left them, some act of negligence on the part of the company must be shewn to make them liable (admitting a still existent duty on their part in conjunction with the owner); instead of which there was only negligence on the plaintiff's part.

¹ *L. c.* at 51.

In *Bergheim v. Great Eastern Railway Company*¹ it was urged upon the Court that where luggage is taken into a carriage with a passenger, the company must be liable on their contract for loss occurring while the owner is reasonably absent from the carriage at stations during the journey; as the contract must be regarded as a contract of insurance, with an exception in favour of a lesser liability, while the train is in motion and the owner in the carriage has some charge of the goods. The view of the Court of Appeal was thus expressed by Cotton, L.J.:² "The company undertake to carry the passenger; they equally undertake to carry his luggage or goods, which, with their consent, are placed with him in the carriage in which he is; and they are not gratuitous bailees of those goods, as they receive them into their carriages in consideration of the passenger paying his fare. The company therefore must, according to ordinary principles, be held liable in respect of those goods as bailees for hire and contractors to carry, and therefore liable for loss or injury caused by negligence, but not otherwise; the company have, in fact, the same liability with respect to the carriage of those goods as they have with respect to the carriage of the passenger himself."³

*Bergheim v.
Great Eastern
Railway
Company.*

Judgment of
Cotton, L.J.

Bergheim's case was the subject of discussion in *Great Western Railway Company v. Bunch*; ⁴ and though the decision in no way necessarily involves the considering of the point decided there, yet expressions of Lord Halsbury, C., and Lords Watson, Herschell, and Macnaghten will certainly be taken as overruling the principles governing the decision in Bergheim's case.

*Great Western
Railway
Company v.
Bunch.*

In *Bergheim v. Great Eastern Railway Company* ⁵ the Court of Appeal decided that where a passenger takes luggage into a railway carriage to be conveyed with him, he thereby releases the railway company from their position of insurers as common carriers, and renders them liable in respect of the luggage so conveyed to the same extent that they are liable to the passenger himself for his own safe conveyance—that is, they are not liable except in respect of negligence.

*Bergheim v.
Great Eastern
Railway
Company
discussed in
Great Western
Railway
Company v.
Bunch.*

In *Great Western Railway Company v. Bunch*⁴ the principle laid down is that, where a passenger takes luggage into a railway carriage to be conveyed with him, the contract of the railway company with him as common carriers in regard to the conveyance of the luggage is modified only to the extent that, if loss happens by reason of want of care on the part of the passenger

¹ 3 C. P. Div. 221.

² *L. c.* at 225.

³ *Cp. per Pollock, C.B., Stewart v. London and North-Western Railway Company, 3 H. & C. 135, at 139. See as to this case, ante, 1216, n. 7.*

⁴ 13 App. Cas. 31.

⁵ 3 C. P. Div. 221.

himself, who has taken within his own immediate control the goods which are lost, the contract of the railway company as insurers does not apply to that loss.

Difference
between the
views taken in
the two cases.

The difference between these views is—the Court of Appeal charges the railway company in those circumstances only where they have been guilty of negligence; the House of Lords extends the obligation to all cases where the passenger has not been guilty of negligence.

Examined.

Opinions of
Lord
Halsbury, [O.,
and Lord
Macnaghten
said by them
to be based on
the view of
Willes, J., in
Talley v. Great
Western
Railway
Company.

For their doctrine the Lord Chancellor and Lord Macnaghten in the House of Lords vouch the authority of Willes, J., delivering the judgment of the Court of Common Pleas in *Talley v. Great Western Railway Company*.¹ “I prefer,” says Lord Macnaghten,² “the view expressed by Willes, J., in *Talley v. Great Western Railway Company*.” “In *Bergheim v. Great Eastern Railway Company*,”³ says Lord Halsbury, C., “the Court of Appeal, commenting upon the case of *Talley v. Great Western Railway Company*, do not, I think, quite accurately represent the judgment of the Court of Common Pleas. In *Talley v. Great Western Railway Company*, that judgment expressly assumes the general liability of the company as common carriers, but that the general liability was modified by the implied condition that the passenger should use reasonable care.”⁴ It will be observed that this statement of the effect of Talley’s case by no means supports the proposition for which it is vouched. That proposition is “that a railway company, in accepting a passenger’s luggage for carriage in a passenger train and in the carriage with the passenger himself, do enter into a contract as common carriers, modified only to the extent that, if loss happens by reason of want of care of the passenger,”⁵ the company is not liable. That is, the company is liable except in one event—the negligence of the passenger. The proof Lord Halsbury, C., gives, is that “the general liability of the company as common carriers . . . was modified by the implied condition that the passenger should use reasonable care.” That is, the company is generally liable; but *one*—not necessarily the only—condition that exonerates them is, &c. So much, then, for the reasoning from what Willes, J., is assumed to say.

Opinion
actually
expressed by
Willes, J.

Willes, J., however, does not leave the matter to be dealt with as matter of inference, but directly expresses his opinion on the point.⁶ After stating various circumstances in which the negligence of the passenger would discharge the railway company, he says: “There is great force in the argument that where

¹ L. R. 6 C. P. 44. The four reports of the judgment are practically identical, L. R. 6 C. P. 44, 40 L. J. C. P. 9, 23 L. T. (N. S.) 413, 19 W. R. 154.

² 13 App. Cas. 31, at 57.

³ 3 C. P. Div. 221.

⁴ 13 App. Cas. at 42.

⁵ L. R. 6 C. P. at 51.

⁶ L. c. at 52.

articles are placed, with the assent of the passenger, in the same carriage with him, and so in fact remain in his own control and possession, the wide liability of the common carrier, which is founded on the bailment of the goods to him and his being entrusted with the entire possession of them, should not attach, because the reasons which are the foundation of the liability do not exist. *In such cases, the obligation to take reasonable care seems naturally to arise, so that when loss occurred it would fall on the company only in the case of negligence in some part of the duty which pertained to them.*"¹ The judgment in which this passage occurs was apparently a written one, since with the exception of an occasional change from the definite to the indefinite article all the reports of it are absolutely at one.² It is somewhat hard then on Willes, J., that, when his only expression of opinion is that where goods are not in the "entire possession" of the railway company loss "would fall on the company only in the case of negligence" on their part, he should be cited as the authority for a doctrine that the company is liable in any event unless the passenger is guilty of negligence.³

Lord Watson and Lord Herschell take different ground. The former, after quoting the passage from the judgment of Cotton, L.J., already cited, and commenting on it, says:⁴ "However that may be, I prefer the principle which appears to me to have been adopted in *Richards v. London, Brighton, and South Coast Railway Company*⁵ and *Butcher v. London and South-Western Railway Company*.⁶ I think the contract ought to be regarded as one of common carriage, subject to this modification, that, in respect of his interference with their exclusive control of his

Lord Watson's
and Lord
Herschell's
opinions.

Adopt the
principle in
Richards v.
London,
Brighton, and
South Coast
Railway
Company, and
Butcher v.
London and
South-Western
Railway
Company.

¹ This is the view taken in *Whitney v. Pullman Palace Car Company*, 143 Mass. 243. Cp. *Kinsley v. Lake Shore and Michigan Southern Railroad Company*, 125 Mass. 54, where *Bergheim v. Great Eastern Railway Company* is cited with approbation.

² The case was argued in the Court of Common Pleas on the 23rd and 24th June 1870, and the judgment was not delivered till the 11th November following.

³ The judgment of Lord Halsbury, C., follows almost verbally the head-note of the report in the Law Reports. The head-note in the Law Journal Report (*The Great Western Railway Company v. Talley*, 40 L. J. C. P. 9) is absolutely inconsistent with it, and is in accord with the law as laid down by the Court of Appeal in *Bergheim's case*. The material portion of the head-note in the Law Reports is as follows: "When a passenger's luggage is at his request placed by a railway company's servants in the carriage in which he is travelling, the company's contract to carry it safely is subject to an implied condition that the passenger takes ordinary care of it, and if his negligence causes its loss the company are not responsible." The corresponding passage in the head-note in the Law Journal is: "The liability of common carriers to insure the safe delivery of goods does not attach to a railway company in respect of passengers' luggage which is not put in the usual luggage van under the entire control of the company, but is placed in the carriage with the passenger and under his own control. With respect to luggage so placed, the obligation of the railway company is only to take reasonable care of it, and consequently the company will not be responsible for its loss unless occasioned by their negligence." Whether, after *Bunch's case*, the head-note in the Law Journal represents the correct view of the law is more doubtful than whether it correctly represents *Willes, J.'s* opinion, which it purports to summarize.

⁴ 13 App. Cas. at 48.

⁵ 7 C. B. 839.

⁶ 16 C. B. 13.

luggage, the company are not liable for any loss or injury occurring during its transit, to which the act or default of the passenger has been contributory." And Lord Herschell¹ is "disposed to agree with my noble and learned friends in preferring the view of this duty to be derived" from the cases cited by Lord Watson.

Inquiry into the principle adopted in those cases.
1. *Richards v. London, Brighton, and South Coast Railway.*

Judgment of Wilde, C.J.

The first of these cases is *Richards v. London, Brighton and South Coast Railway Company*.² Plaintiff's wife became a passenger on the defendants' railway, taking with her in the carriage various articles of luggage, amongst others a dressing-case, that was put under the seat. On arriving at the terminus, the maid was about to remove them to the coach, when some porters of the company desired her not to trouble herself, as they would see to the luggage. The dressing-case was subsequently lost, for which loss the company were held liable. Wilde, C.J., said:³ "On the part of the defendants it is contended that the goods *were* carried. But the allegation is, that they (the goods) were received by the company to be carried and conveyed *and delivered* at the terminus in London, and they were not *delivered*. I think it was clearly established that the dressing-case was delivered to the company." At the end of his judgment he says:⁴ "The fact of the dressing-case having been placed under the seat of the carriage, and so under the more immediate control and inspection of the passenger, in my opinion makes no difference." The duty of the company was not only to carry the goods, but to deliver them. The fact that the passenger had the goods with him during the carriage did not render the duty to deliver any the less. As was said by Cresswell, J.:⁵ "They [the company] could not be said to have fulfilled their contract without delivery; and, if it was the usual course to deliver the luggage of passengers at a particular part of the platform, that was the sort of delivery the defendants took upon themselves to make."

Effect of the case.

No expression in the case goes further than to affirm that, assuming the passenger to have taken upon himself responsibility in the carriage, the obligation of the company was resumed when the period came for performance of that portion of the contract that related to delivery. In any event there was *default* on the part of the company.⁵

¹ 3 App. Cas. at 55. His Lordship, however, prefaces this statement with the qualifying words: "although it is not necessary in this case to determine what is the nature of the duty devolving upon a railway company in respect of luggage carried, or intended to be carried, in the same carriage with the passenger."

² 7 C. B. 839.

³ *L. c.*, at 858.

⁴ *L. c.* at 859.

⁵ See per Wilde, C.J., at 858; per Cresswell, J., at 860; per Williams, J., at 861.

The other case is *Butcher v. London and South-Western Railway Company*.¹ The facts are only distinguishable from *Richards v. London, Brighton, and South Coast Railway Company* in this, that the plaintiff retained a carpet-bag in his own possession, and alighted from the carriage with the bag in his hand; whereas, Mrs. Richards never personally interfered with the missing article. The bag was subsequently taken from his hand by a person wearing the ordinary dress of a porter, and lost. Jervis, C.J., in giving judgment for the plaintiff, said: "The case of *Richards v. London, Brighton, and South Coast Railway Company* establishes that, though not in express terms engrafted into it, it is a part of the contract of a railway company with its passengers, that their luggage shall be delivered at the end of the journey by the porters or servants of the company into the carriages or other means of conveyance of the passengers from the station. Parties may, however, if they choose, agree to accept a delivery short of such ordinary delivery; and it is possible the facts here might have warranted the inference of a delivery short of that which I have referred to. But that would be a question for the jury." The judgments of Cresswell, Williams, and Crowder, JJ.—went on the ground that the duty of the company was "to convey it [the luggage] from the railway carriage to a cab, if required to do so;" that they were required to do so, failed, and so were rendered liable.

2. Butcher v. London and South-Western Railway Company.

Judgment
Jervis, C.J.

In both cases it is to be observed there was default in the company; while in both the goods lost were *expressly* left to the company to fulfil their duty of delivery with regard to them. It is a somewhat unusual stretch of reasoning to argue from cases of negligence to one where there is no negligence; from cases of actual remissness in duty to a case of implied remissness; from the assertion of the principle that, where there is positive evidence that a passenger entrusts his goods to a railway company, in whose charge they ought to be when the loss occurs, the liability is that of a common carrier; to the assertion of a principle that where there is positive evidence that the passenger has taken goods under his own care, the liability of the company is that of a common carrier, unless and until they can affix the imputation of negligence on the passenger, and when no act has been done notifying the company of a change of intention, or even when there has been no change of intention.

Consideration
of the cases.

The results of our examination, then, shew that the decision in *Bergheim v. Great Eastern Railway Company* is not in conflict with the previous decisions, or with the *dicta* of the judges

Result.

¹ 16 C. B. 13.

² *L. c.* at 22.

³ *L. c.* at 23 and 25.

giving those decisions, and cited by the Law Lords in the House of Lords in *Great Western Railway Company v. Bunch*; though the decision of *Bergheim v. Great Eastern Railway Company* is certainly inconsistent with expressions used in the judgments in *Le Conteur v. London and South-Western Railway Company*,¹ which case, strangely enough, was neither cited in argument nor in the judgments in *Great Western Railway Company v. Bunch*. The expression of opinion against the rule laid down in *Bergheim v. Great Eastern Railway Company* by the majority in the House of Lords in *Great Western Railway Company v. Bunch* was so distinct that the rule there indicated will have to be followed by all Courts other than the House of Lords. Yet as the rule indicated is not necessary for the actual decision of *Great Western Railway Company v. Bunch*, the House of Lords itself is not precluded from reconsidering the question of principle when a case raising the question comes before them.²

II. Where the luggage is not ordinary or personal luggage.

Secondly: The luggage claimed to be conveyed may be of a different character from ordinary or personal luggage.

The law, as fixed by the carrier's private Act of Parliament—if the carrier is a railway company, as now most frequently happens—is that the passenger is allowed to take with

¹ L. R. 1 Q. B. 54.

² In *America, in Louisville, &c. Railroad Company v. Katzenberger*, 57 Am. R. 232, it is said, at 234, to be "well settled, and that in accord with the nature of the contract, that all reasonable liberality is allowed to the passenger in control of his luggage for the purpose of its use upon the journey without releasing the carrier from his obligation to see to its safety. Especially would this be true as to the character of luggage involved in this case, a valise containing clothing for use on the journey." But there the plaintiff, so far from taking charge of his luggage, "gave his satchel or valise to the porter of the sleeper on entering the car." And this is the ground on which the case is declared by Thayer, J., in *Bevis v. Baltimore Railroad Company*, 56 Am. R. 850, n., "not to be in conflict" with a whole list of cases which he cites. The law in America is stated in the head-note to *Illinois Central Railroad Company v. Handy*, 56 Am. R. 846, as follows: "If a passenger on a sleeping-car leaves his money in the car on leaving the car without the knowledge of the company, and it is stolen by some one not employed by the company, if the company has kept a reasonable guard and watch it is not liable for the loss." And this not upon the ground of the negligence of the passenger, but of the absence of negligence in the company. See an article on Bunch's case in the Court of Appeal in *Law Quart. Rev.* (1886), vol. ii. 469, with a note on the foreign law, the author of which seems doubtful of the policy of the decision on the point discussed in the text (see at 479). There is an exhaustive note to *Pullman Palace Car Company v. Lowe*, 26 Am. St. R. 325, at 331-340, on the duties and liabilities of sleeping-car companies. The following are the principal conclusions, which are supported by abundant American authority. Sleeping-car companies are not innkeepers, nor is their liability that of innkeepers. They are bound to the exercise of reasonable care and vigilance to guard the persons and property of their passengers, especially while the passengers are sleeping. A railway company using the cars of a sleeping-car company, becomes liable for the safe carriage of passengers travelling in the cars. There is no liability for loss of property while travelling in a sleeping-car on mere proof of loss without affirmative proof of negligence. Sleeping-car companies' liability for the defaults of their servants extends to all necessary baggage or reasonable articles which a traveller usually takes on a journey. Money in a passenger's clothing worn during the day and placed under his pillow at night is not in the custody of the car company. In allotting the accommodation at their disposal sleeping-car companies must use no undue preference.

him a certain specified amount of luggage free. If there is more than the specified amount, a payment is to be made, which is fixed by scale.

The cases have turned mainly on the passenger seeking to recover in respect of lost goods, and under the designation of personal luggage, articles which do not properly come within that designation. The subject of discussion has been, what are the liabilities of the carrier when goods have been lost that have been carried for passengers in pursuance of the obligation to carry a specified amount of luggage free, but which have, in fact, not been personal luggage? Point raised by the cases.

The rule applicable was first laid down in *Great Northern Railway Company v. Shepherd*,¹ an appeal from a county court heard before Parke and Platt, BB. Plaintiff and his wife were third-class passengers on the defendants' railway, and brought with them, along with other luggage, two paper parcels which contained merchandise. The porters of the company did not interfere in any way. The plaintiff and his wife themselves deposited the parcels in the carriage and took charge of them. A collision occurring during the journey, the plaintiff and his wife were both much hurt, and, upon being assisted into another train to continue their journey, the plaintiff asked one of the porters about the luggage, who told him not to make himself uneasy, it would be all right. The merchandise, however, was lost. The Court gave judgment for the company. "In this case," said Parke, B.,² "there being no special contract, the defendants were bound to carry the plaintiff and his luggage, which term, according to the true modern doctrine on the subject, comprises clothing and such articles as a traveller usually carries with him for his personal convenience; perhaps even a small present or a book for the journey might be included in the term. . . . Now, if the plaintiff had carried these articles [124 dozen of ivory handles, *inter alia*] exposed, or had packed them in the shape of merchandise, so that the company might have known what they were, and they had chosen to treat them as personal luggage and carry them without demanding any extra remuneration, they would have been responsible for the loss. . . . If, indeed, they had notice, or might have suspected from the mode in which the parcels were packed, that they did not contain personal luggage, then they ought to have objected to carry them; but the case finds that they had no notice of what the packages contained. Whether this was done Great Northern Railway Company v. Shepherd.
Duty of the company as laid down by Parke, B.

¹ (1852) 8 Ex. 30. Cp. *Cusack v. London and North-Western Railway Company*, 7 Times L. R. 452.

² 8 Ex. at 38.

for any fraudulent purpose it is not necessary to inquire; because, even if there was no fraudulent intent, the plaintiff has so conducted himself that the company were not aware that he was not carrying luggage, and therefore the loss must be borne by him."

Keys v.
Belfast and
Ballymena
Railway
Company.

The effect of the rule thus laid down was much considered in the Irish case of *Keys v. Belfast and Ballymena Railway Company*.¹ The plaintiff, with knowledge that no merchandise was allowed as luggage, took a box of merchandise in the carriage with him when travelling by the defendants' line. During the journey a guard demanded and took it to carry in the luggage van. One of the company's servants stole it. The Irish Court of Common Pleas gave judgment for the plaintiff. The Exchequer Chamber were equally divided. On the one hand, the case of *Great Northern Railway Company v. Shepherd* was considered in point; on the other hand, it was distinguished, because the decision of *Parker, B.*, was not that the company had no notice, but that the plaintiff had so conducted himself that the company were not aware of the nature of the articles; while in the case before the Court "the nature of the article was patent; fraud and concealment on the part of the plaintiff is negatived, and the avoidance of the contract is pressed, to the extent not merely of the liability for the mode of performing it, but *in toto*, and to the extent of transferring property."²

Opinion of the
Lord Chan-
cellor (West-
bury).

In the House of Lords, the judges being consulted, judgment was unanimously given for the defendant, the plaintiff in error, Lord Westbury, C., summing up his remarks as follows: "In substance, therefore, it comes to this, that the plaintiff intended to have the goods carried in the carriage with him and escape the obligation of the paying for their carriage as merchandise, and, under those circumstances, there could not exist, in law or in reason, any contract whatever between the plaintiff and the company touching those goods, upon the breach or in default of the performance of which contract the plaintiff could have a right against the company; and I think that any man of ordinary understanding would have had no difficulty whatever in disposing of the case if the plaintiff had appeared in court to urge his claim, and the Court had addressed to him the

¹ 8 Ir. C. L. R. 167, 11 Ir. C. L. R. 145, in the House of Lords under the name of *Belfast Railway Company v. Keys*, 9 H. L. C. 556.

² Per Fitzgerald, B., 11 Ir. C. L. R. 145, at 157.

³ This quotation is from the *Law Times* report, 4 L. T. (N. S.) 841, at 844. In 9 H. L. C. at 573 the report of the Lord Chancellor's judgment stops at the sentence, "the plaintiff could have a right against the company." The conclusion of the passage is represented by this sentence: "The plaintiff ought to know that there can be but one opinion entertained upon the merits and substance of the case."

question, 'For what do you claim against the company?' 'I claim for certain goods I took with me as passenger in the railway carriage.' Had the question been put to him, 'Did you know the rule of the company?' he would have been obliged to answer, 'I did know that rule.' 'Is it possible, then,' the judge would answer, 'that you can claim against a company for goods which you took into the carriage of the company in violation of the rule which you knew they had established, and which their servants were bound to observe?'"

While *Keys v. Belfast and Ballymena Railway Company* was going through the courts, *Cahill v. London and North-Western Railway Company*¹ was decided by the Common Pleas on the authority of the *Great Northern Railway Company v. Shepherd*.² The plaintiff's contention was that a contract for hire over and beyond what was paid for the conveyance of himself and his personal luggage must be implied from the fact that the porter in the employ of the company must have seen, from the external appearance of the package (which had the word "Glass" painted on the lid of the box), that the package contained goods other than personal luggage. To this Willes, J., replied:³ "It is impossible to infer that the porter did or could make any such contract so as to bind the company. I think that would be pushing to an absurdity the rule that a principal is bound by the acts of his agent within the scope of his ordinary employment." The decision was affirmed by the Exchequer Chamber,⁴ where Cockburn, C.J., delivered the judgment of the Court, in the course of which he said: "That which was said⁵ by Parke, B., in *The Great Northern Railway Company v. Shepherd*, is in perfect conformity with the view which we now take of the question."

Cahill v. London and North-Western Railway Company. Contention advanced in order to take the case out of *Great Northern Railway Company v. Shepherd*.

Met by Willes, J.

Whose view was affirmed in the Exchequer Chamber.

The law may, therefore, now be considered settled on the basis that if a passenger, who knows, or ought to know, that he is only entitled to take his ordinary personal luggage free of charge, chooses to carry with him merchandise for which the company are entitled to make a charge, the company are not liable to compensate him in respect of loss or injury, when he has abstained from giving notice of the contents; but if the company choose to take merchandise as ordinary luggage when they know that it is merchandise, it is not competent to them, in the event of a loss, to claim exemption from liability on the ground that the loss is of merchandise and not of ordinary luggage. To

The law as now settled.

¹ (1861) 10 C. B. N. S. 154.

² 10 C. B. N. S. at 175.

³ Referring to the passage quoted *ante*, 1227.

⁴ 8 Ex. 30.

⁵ 13 C. B. N. S. 818.

constitute notice by which the railway company's rights are waived, notice to a porter is not sufficient.¹ The circumstances must be such as to shew notice to some one in sufficient authority to affect the course of the company's business.

Question of notice more fully considered in the American cases, *Hannibal Railroad v. Swift*.

This last point has been more fully considered in the American than in the English cases. Thus, in *Hannibal Railroad v. Swift*² the rule laid down is: "Where a railroad company receives for transportation, in cars which accompany its passenger trains, property of this character [statuary, pictures, &c.] in relation to which no fraud or concealment is practised or attempted upon its employees, it must be considered to assume with reference to it the liability of common carriers of merchandise." "If property offered with the passenger is not represented to be baggage, and it is not so packed as to assume that appearance, and it is received for transportation on the passenger train, there is no reason why the carrier shall not be held equally responsible for its safe conveyance as if it were placed on the freight train, as undoubtedly he can make the same charge for its carriage."

Sloman v. Great Western Railway Company.

The question of what is notice that goods are not personal luggage was raised in *Sloman v. Great Western Railway Company*;³ where a lad of eighteen had two large trunks filled with samples, different from ordinary travelling trunks, and had a valise for his personal baggage. He delivered the trunks to a baggage-master, and, when asked where he wanted them checked to, replied that he did not then know, as he had sent a despatch to a customer at F. to know if he wanted any goods; if not, he wanted them to go to R., where he expected to meet some customers. Soon after, he had them checked to R., paying two dollars, and receiving a receipt ticket for them, headed, "Receipt ticket for extra baggage." They were not weighed, and no evidence was given as to any regulation of the company in reference to charging extra compensation for passengers' luggage. The jury found there the company had notice. On appeal the Court of Appeals held there was evidence warranting the finding. The conjunction of facts here existing has never been found in an English case, viz., first, the delivery to a "baggage-master"—most probably the officer authorized to make all proper arrangements; secondly, the appearance of the packages; thirdly, a distinct statement of the purpose for which they were being carried; fourthly, an extra charge made not referable to excess of luggage.

Distinctive features of the case.

¹ Per Willes, J., 10 C. B. N. S. at 175.

² 12 Wall. (U. S.) 262, at 273.

³ 67 N. Y. 208.

In a Massachusetts case—*Blumantle v. Fitchburg Railroad Company*¹—the plaintiff offered and delivered certain bundles as his personal luggage, which the “baggage-master” spoke about at the time as containing merchandise, yet gave him checks for them, as he was bound to do for personal baggage of passengers. The Court, following the English decisions, held that the plaintiff could not recover for the loss, since “evidence tending to shew that the baggage-master knew or supposed the bundles to contain merchandise, or that other passengers had similar bundles, would not warrant the jury in finding that the defendant agreed to transport the plaintiff’s merchandise, or became liable therefor as common carriers.” This decision warrants the inference that, in America at least, knowledge and acquiescence by the responsible officer is not sufficient to raise the presumption of a contract, apart from contractual words or a payment or arrangement, from which a contract can “more probably be implied than not.”

Blumantle v. Fitchburg Railroad Company.

Thirdly: The luggage may not come into or pass from the custody of the carrier in his capacity of carrier; so that the circumstances of its possession may impose different obligations from those that would attach if the possession of the carrier was in his character of carrier.

III. Where the possession is in another character than that of carrier.

The distinction between the cases where a railway company holds luggage as warehouseman, and where it holds luggage in the transit to or from the train and preparatory to delivery to the passenger, is plain, and has already been pointed out in the cases having reference to conditions of delivery.² There are, however, questions of difficulty on the border-line between the two classes of cases. For example, in the *Great Western Railway Company v. Goodman*,³ the facts shewed a delivery to the company’s servants of luggage, but no booking of the luggage under a by-law providing “that every first-class passenger will be allowed 112 lb., and every second-class passenger 56 lb., of luggage free of charge; but the company will not be responsible for the care of the same unless booked and paid for accordingly.” In the absence of evidence of arrangements for booking, the defendants were held liable for the loss as carriers, and without proof of negligence.

Distinction between a holding as warehouseman and a holding as carrier.

Great Western Railway Company v. Goodman.

So, in the cases we have already noticed, *Richards v. London, Brighton, and South Coast Railway Company*⁴ and *Butcher v. London and South-Western Railway Company*,⁵ the company

Richards v. London, Brighton, and South Coast Railway Company.

¹ 127 Mass. 322.

² *Harris v. Great Western Railway Company*, 1 Q. B. D. 515; *Parker v. South-Eastern Railway Company*, 2 C. P. Div. 416. *Ante*, 1113.

³ 12 C. B. 313.

⁴ 7 C. B. 839.

⁵ 16 C. B. 13.

Butcher v. London and South-Western Railway Company.

were in each case held liable; because their contract was not merely to carry, but to deliver, and after the goods were in the hands of their porters in course of delivery they were lost. The unsuccessful contention in the first of these cases was that the company were only liable as carrier during the transit; in the second, that the man who received the bag was not at all authorized by them. The conclusion from them is that the liability of the company, though it may be broken by the passenger assuming the care or supervision of his own goods, is a liability capable of reviving at any period intermediate between the time of the reception of the goods to the time they are delivered over for the further prosecution of his journey.

Great Western Railway Company v. Bunch.

Great Western Railway Company *v.* Bunch must again be referred to in this connection.¹ Plaintiff's wife arrived at Paddington Station at 4.20 P.M. on Christmas Eve, with a bag and two other articles of luggage, in order to travel by the 5 P.M. train. A porter labelled the two articles, and took all the luggage to the platform, the train not then being at the platform. Plaintiff's wife then said she wished the bag to be put into a carriage with her, and asked the porter if it would be safe to leave it with him. The porter replied that it would be quite safe; he would take care of the luggage and put it into the train. She then went to meet her husband and get her ticket. Ten minutes after she had left the luggage she and her husband returned, and found that the two labelled articles had been put into the van of the train, but that the porter and the bag had disappeared. In an action in a county court the plaintiff recovered £18. In the Divisional Court, Day, J., gave judgment for the defendants, A. L. Smith, J., who was of opinion that the defendants were liable, withdrawing his judgment. In the Court of Appeal, Lord Esher, M.R., and Lindley, L.J., reversed the judgment of the Queen's Bench Division, Lopes, L.J., dissenting; and their decision was upheld by the House of Lords, Lord Bramwell dissenting.

Contention of the railway company.

The railway company contended, first, that the bag was handed

¹ 13 App. Cas. 31. In the Court of Appeal, *Lovell v. London, Chatham, and Dover Railway Company*, 45 L. J. Q. B. 476, was cited, which seems precisely in point, and in which the test was adopted of inquiring whether the acts done by the porters were done with a view to put the luggage in the train for the purposes of the journey. *Agrell v. London and North-Western Railway Company* (Ex. Ch.), 34 L. T. (N. S.) 134, n., is distinguishable as the case of luggage given to the porter not for the purposes of the journey, but for the convenience of the passenger. *Hickox v. Naugatuck Railroad Company*, 31 Conn. 281, shows the American Courts to have arrived at a similar decision five-and-twenty years earlier. In *Welch v. London and North-Western Railway Company*, 34 W. R. 166, Bunch's case is distinguished and the railway company held not liable. There the passenger having missed his train left his luggage in charge of a porter, saying he would travel by the next train which did not start for an hour, and then went to a billiard-room to spend the interval.

to the porter, not for transit, but to take charge of; secondly, that if it were received for transit the company were only liable for negligence, and were not insurers.

The principle of the decision of the majority is thus expressed by Lord Watson: ' " Whether passengers' luggage, delivered to a railway porter is in his possession for present, or merely with a view to future transit, is necessarily a question of degree depending upon the circumstances of the case. Railway companies, as a matter of fact, frequently provide for the travelling public, not only booking-offices, but refreshment-rooms and other conveniences; and passengers who merely avail themselves of such accommodation as incidental to their use of the railway, cannot be held to have temporarily ceased to prosecute their journey. It is impossible to fix any precise limit of time prior to the starting of a particular train, within which the company are to be liable for passengers' luggage delivered to their servants for conveyance by it, and beyond which they are not to be liable. In my opinion, the company are responsible for luggage delivered to, and in the custody of, their servants for the purpose of transit, whenever it can be reasonably predicated of the passenger to whom it belongs that he is actually prosecuting his journey by rail, and is not merely waiting in order to begin its prosecution at some future time." '²

Principle of the decision as expressed by Lord Watson.

Further, the House of Lords were unanimous in holding that when luggage is so received by the servants of a railway company, and continues in their possession for the purpose of being conveyed to the train or retained while the passenger is taking his ticket, the liability of the company is that of a common carrier.

House of Lords hold that luggage received by a railway company for purposes of transit is held in their capacity of common carrier.

The view of Lord Bramwell was³ that it is not part of the employment of a porter to take charge of luggage except during the transit from the cab to the train; and that the interval between the arrival of the passenger and the starting of the train, in the case before the House—forty minutes—was much too long a period to warrant the inference that this was the purpose the porter had in view.

Lord Bramwell's view on scope of porter's employment.

The effect of the decision is to leave to the jury the determination in each case of what is a reasonable time prior to the starting of a train within which, if luggage is delivered to the company's porters, the company are fixed with the liabilities of common carriers as holding the luggage for the purpose of transit and not of storage.⁴

Effect of the decision.

¹ 13 App. Cas. at 45.

² See also per Lord Herschell at 53.

³ 13 App. Cas. at 51.

⁴ *Cutler v. North London Railway Company*, 19 Q. B. D. 64, suggested the question

Test of reasonable time:
Patscheider v. Great Western Railway Company.

The test of "a reasonable time" had before been laid down in *Patscheider v. Great Western Railway Company*,¹ where a lady's maid, having seen her box taken from the luggage-van and placed on the platform with other luggage of her mistress, went for the porter of the hotel to take the luggage to the hotel, but on her return with him could not find her box. The plaintiff was held entitled to recover; and the rule laid down in *Redfield on Carriers*² was cited with approbation, that it is the duty of a railway company, in regard to the baggage of a passenger which has reached its destination, to have the baggage ready for delivery upon the platform, at the usual place of delivery, until the owner, in the exercise of due diligence, can call and receive it; and it is the owner's duty to call for and remove it within a reasonable time.

What constitutes delivery.

Hodkinson v. London and North-Western Railway Company.

Great Western Railway Company v. Bunch and Patscheider v. Great Western Railway Company practically exhaust the subject. The one points out the rule for the reception, the other for the delivery of luggage. *Hodkinson v. London and North-Western Railway Company*³ is the necessary pendant to *Patscheider v. Great Western Railway Company* which, while indicating the rule applicable, leaves untouched the question of what constitutes delivery.

Hodkinson v. London and North-Western Railway Company is an authority for the proposition that actual removal from the railway's premises, or even actual corporal possession, is not necessary to constitute a delivery that will relieve the railway of its carrier's liability; but it is enough if there is a dealing with it inconsistent with the continuance of the transit. This was hinted at by Jervis, C.J., in *Butcher v. London and South-Western Railway Company*,⁴ in circumstances where the action of the porter was susceptible of either view, and which were therefore to be left to the jury.

of what liability there is in a railway company where luggage is carried on after the passenger has left the train short of his destination. The point is not decided. *Bunch's* case would, however, require the application of the test whether the passenger was negligent. See *ante*, 1221. As to a passenger waiting in a station after the train by which he proposed to travel is gone, see *Heinlein v. Boston, &c. Railroad Company*, 147 Mass. 136, 9 Am. St. R. 676, as to when one ceases to be a passenger, and the duty to him while he remains one, *Commonwealth v. Boston and Maine Railroad*, 129 Mass. 500, 37 Am. R. 382. *Ante*, 1154, and 1159.

¹ 3 Ex. D. 153. *Ante*, 1010.

² § 73, at 61.

³ 14 Q. B. D. 228. *Cp. Stallard v. Great Western Railway Company*, 2 B. & S. 419, where a person deliberately left his personal baggage on the platform of a railway station and did not call for it till the following day, the railway company were held not chargeable as carriers but as warehousemen or bailees only: *Vineberg v. Grand Trunk Railway Company*, 13 Ont. App. 93.

⁴ 16 C. B. 13, at 22: "Parties may, however, if they choose, agree to accept a delivery short of such ordinary delivery."

In the present case the circumstances were wholly unequal- Facts.
vocal. On the arrival of the plaintiff's train at the station, the porter asked if he should engage a cab for her and her luggage—two boxes—which was taken from the luggage-van. She said she would walk to her destination, and would leave her boxes at the station for a short time and send for them. The porter said, "All right; I'll put them on one side and take care of them." Some hour or two after, the plaintiff claimed her boxes, one of which had been delivered by mistake to a woman who had asked for it. The Court held that by leaving the boxes "in the custody of the porter," who had ceased to be acting as the company's agent, the plaintiff had received delivery, and exonerated the company from their common law liability. The correctness of this decision is unquestionable. The porter was not the agent of the company for custody; and there was no transit in which the company could have any concern for which he could be agent. In Bunch's case the decision went on the ground that there was evidence of a delivery to the porter as ancillary to the transit. In the present case the delivery to the porter was subsequent to delivery on the completion of the transit; and that delivery marks the termination of the carrier's contract.¹ The only possible method of arguing the case successfully seems to be to contend that delivery was not made; then the luggage could not have been placed by the plaintiff in the custody of the porter.

An earlier case, *Midland Railway Company v. Bromley*,² deals with the transfer of luggage from one station to another. Plaintiff was a passenger by the Midland Railway to Bristol, and his portmanteau was placed in the luggage-van. On the arrival of his train at Bristol the plaintiff told one of the porters that he wished to go on by the Bristol and Exeter Railway. The porter got the plaintiff's portmanteau, and put it with other luggage on a truck to take it across to the Bristol and Exeter station. At the trial plaintiff said he saw the porter with the truck enter the Bristol and Exeter station, pass down a decline and then cross the station, but he did not see the portmanteau after he saw it on the Midland platform. A county court judge held on this evidence that there was no delivery of the plaintiff's portmanteau either to himself or to the Bristol and Exeter Railway Company, according to the plaintiff's contract with the defendants, so as to determine the defendants' liability, and he accordingly gave judgment for the plaintiff. The Court of Common Pleas

Transfer from
one station to
another.
Midland
Railway
Company v.
Bromley.

¹ *Richards v. London, Brighton, and South Coast Railway Company*, 7 C. B. 839.

² 17 C. B. 372.

Judgment of
Jervis, C.J.

reversed this, holding there was no case made out to go to a jury. "It is quite clear," said Jervis, C.J.,¹ "that the plaintiff thought the portmanteau was on the truck when he saw it pass from the one railway to the other, or he would have made more particular inquiry after it. It being equally probable that the loss occurred on the Bristol and Exeter Railway as that it took place on the Midland Railway, and the *onus* of shewing a breach of the contract resting upon the plaintiff, I think he has failed to shew that he was entitled to recover."

Kent v.
Midland
Railway
Company.

With this must be considered *Kent v. Midland Railway Company*.² The Midland Railway Company had the use of the London and North-Western's station at Birmingham, to which they conveyed the plaintiff, with his luggage, in prosecution of a portion of a journey which he was to complete on the London and North-Western Company's line. The plaintiff's luggage was removed by one of the porters from the Midland train across the station in the direction of the line of the London and North-Western, whence the train in which the plaintiff purposed to pursue his journey was to start. There was nothing to shew that the luggage which was lost to the plaintiff was ever delivered into the custody of the London and North-Western Railway Company. Plaintiff brought an action against the Midland Railway Company in respect of the loss. The Midland Railway Company set up a condition which provided they should not be liable for loss arising off their own lines. Plaintiff had a verdict with leave for the defendant to move, but the Court refused a rule; as "it was the defendants' duty to carry it (the luggage) from one platform to the other, for it must be taken that by their contract they were bound to take the luggage from their own train to that of the North-Western train, and they were entitled to the services of the porters at the station. Consequently the porter, while he was taking the luggage from one platform to the other, was acting as the defendants' agent or servant."³ "I think," said Blackburn, J.,⁴ "'off the line' must be understood as equivalent to out of their custody and in the custody of some other company. If the plaintiff had sued the London and North-Western Company (assuming that company could have been liable to the plaintiff), they would have said: 'We did not take the plaintiff's luggage; it never was in our custody, but was still in the control of the Midland Company, and under their orders when last seen, and it was never shewn to have been delivered to us.' I cannot put such a construction as to make nobody

¹ *L. c.* at 381.

² *L. c.* per Cockburn, C.J., at 4.

³ *L. R.* 10 Q. B. 1.

⁴ *L. c.* at 5.

liable at all; and I think that unless it be shewn to be on the line of another company, it must be held not to be 'off the line' of the defendants."

This case was decided on the ground of the plaintiff's failure to discharge the *onus* upon him. In similar cases it might be contended that the company's undertaking is to deliver on their platform or to cabs within their station, and that when a transfer is required this must be effected by means of special porters, whose receipt of goods is a delivery by the railway company the journey on whose line is terminated to the railway company by which the journey is to be prosecuted.

The points of distinction between *Midland Railway Company v. Bromley* and *Kent v. Midland Railway Company* should be noted in view of the difference of the result in the two cases.

Distinction between *Midland Railway Company v. Bromley*, and *Kent v. Midland Railway Company*.

First, in *Bromley's* case the journey for which the plaintiff took his ticket had ended. When his luggage was lost he was beginning a new journey, and had given his luggage a new destination. In *Kent's* case, on the other hand, the loss occurred in the prosecution of a journey for the whole of which the plaintiff had taken a ticket from the defendants, and in the course of which his contract implied a delivery of the luggage to the other company.

Secondly, in *Bromley's* case the truck on which plaintiff's luggage was seen by him to be placed was also seen by him to enter the station of the company on whose line he was about to travel. In *Kent's* case there was nothing to shew that the luggage was ever delivered into the custody of the London and North-Western Railway Company at all; consequently the defendants' contract was unperformed.

Bromley's case may be distinguished from *Kent's*, and the decision maintained, on the ground that the plaintiff himself gave sufficient evidence of the delivery of the luggage to put himself out of court by shewing circumstances from which delivery, in accordance with his instructions, should be inferred. It therefore became incumbent on him to shew circumstances pointing to negligence. This, however, is not the ground of the decision, which is "that the *onus* of shewing a breach of the contract rested on the plaintiff,"¹ while "the evidence set out in the case is manifestly as consistent with the one view as the other."

Cases considered.

Now as to this it must be borne in mind that a railway company is a common carrier of passengers' luggage;² and

¹ Per Jervis, C.J., 17 C. B. at 381.

² *Macrow v. Great Western Railway Company*, L. R. 6 Q. B. 612, at 618. See *Redfield, Carriers*, § 71. The author continues: "It is considered that, as railways have made their checks evidence in regard to the delivery of baggage, the possession

the rule is that, if goods entrusted to a common carrier be lost or damaged, the law conclusively presumes the carrier guilty of negligence unless he can bring himself within the exceptions. Thus the loss or damage of luggage raises a *prima facie* inference of want of care of the carrier, which in the absence of evidence to the contrary will render him liable to an action.¹ Bromley's case, then, so far as it lays down that there is an *onus* on the plaintiff to shew some breach of contract beyond the mere fact of the loss, cannot be treated as law; and the proposition in Kent's case—that when luggage is shewn to have been delivered to a railway company the *onus* lies on them to shew that they have delivered it, failing in which they remain liable—is a subsequent decision, in accordance both with the authorities and with the principle governing in this branch of law, which regards the carrier as an insurer, and his liability as independent of default of any kind.

Distinction between the conveyance of luggage in prosecuting a journey already begun, and the transfer of luggage for starting a new journey.

There appears to be a manifest distinction between the cases where luggage is to be conveyed over to another station in prosecution of a journey already begun, as in Kent's case, and the mere transfer of luggage to another station after the completed journey, as in Bromley's case, for the purpose of starting on a new one. In the former the contract is most usually to deliver over to the company with whom the passenger was continuing his journey the luggage which the company with whom he has completed his journey hold with a common carrier's liability; and till that is completely done the company will not be discharged. In the latter the transfer to the second company's line may be in very various circumstances. The circumstance, that to enable the luggage to be conveyed to the other company's station a new destination has to be designated by the owner, nevertheless, seems essential. This may be effected by the delivery into a cab or carriage, or by delivery to "transfer porters"—a special class of men whose intervention may be either as agents of the receiving company, or possibly as agents of the passenger. The tendency of the decisions is to regard delivery as incomplete until the luggage is unequivocally transferred from the control of the carrier.

It is not to every train that the passenger's right to carry

of such check by a passenger is evidence against the company of the receipt of the baggage. In one case, the Court say, 'It stands in the place of a bill of lading' (*Dill v. Railway Company* (7 Rich. 158)). Cp. *Wilton v. Atlantic Royal Mail Steam-Navigation Company*, 10 C. B. N. S. 453, on the construction of a condition as to luggage on a passenger ticket.

¹ Taylor, *Evidence* (8th ed.), 205, 206, citing *Ross v. Hill*, 2 C. B. 877, at 890; *Cogg v. Bernard*, 2 Ld. Raym. 909, at 918, 1 Sm. L. C. (9th ed.), 201, at 237; *Harris v. Costar*, C. & P. 636; *Great Northern Railway Company v. Shepherd*, 8 Ex. 30.

luggage attaches. *Rumsey v. North-Eastern Railway Company*¹ *Rumsey v. North-Eastern Railway Company.* decides that there is nothing in the company's private act enacting that "every passenger travelling upon the said railways may take with him his ordinary luggage," nor any principle of public policy which prevents a passenger from foregoing his right to carry luggage with him free of charge in consideration of a reduction in the fare. A passenger by an excursion train, for which the fare was 5s. as against the ordinary fare of 9s., and which was run subject to a condition that the company would not carry luggage for those availing themselves of it, was accordingly held bound to pay the ordinary goods rate (if demanded) for the carriage of luggage which he had procured to be carried in the excursion train in contravention of the conditions of the journey. "It is undoubtedly," said Erle, C.J., "competent to any man to renounce a privilege which is given to him by a statute." The plaintiff is, as it seems to me, in the same situation as he would have been in if, having got a 9s. ticket, he had gone back to the clerk and got him to exchange it for a 5s. excursion ticket, on his agreeing to go without luggage, and had then, without the knowledge of the company's servants, put his portmanteau into the van again."

Opinion of
Erle, C.J.

The proposition that the carrier by reason of his contract is only liable to those with whom his contract was made would *prima facie* seem a proposition so indisputable, and according to general principles of law, as to need no authority. In *Becher v. Great Eastern Railway Company*,² it was in terms laid down. A servant having his master's portmanteau with him, took a ticket to travel on the defendant's line. In the course of the journey the portmanteau was lost. The master sued the defendants, but was held not entitled to recover, as there was nothing to impose any duty beyond the existence of the contractual relation by which the company had agreed to take the servant and his personal luggage free of charge. "If," said Lush, J., "they had been informed that the portmanteau was not his luggage, they would not have been bound to take it, and in all probability they would not have taken it. It was taken as the servant's own luggage, and if any action can be maintained, it must be in the name of the servant."

Becher v.
Great Eastern
Railway
Company.

In *Martin v. Great Indian Peninsula Railway Company*⁴ there was a count in tort, and though the contract was not made with the plaintiff, but with the Indian Government, of which he was an officer, it was held on demurrer that he could recover for a wrong

Martin v.
Great Indian
Peninsula
Railway
Company.

¹ 14 C. B. N. S. 641.

² L. R. 5 Q. B. 241.

³ L. c. at 649. *Ante* 874, n. 1.

⁴ L. R. 3 Ex. 9.

done by which he was affected in his property, and for which, independently of contract, he had a right to obtain redress. Kelly, C.B., was disposed to think that the breach of duty charged was only a breach of duty constituted by contract, and that the contract being made with other people than the plaintiff was not available for him.¹ "But," he added, "my learned brothers take a different view, and think that the second count charges a wrong done by which, therefore, independently of contract he has a right to obtain redress. I do not wish to dissent from this view; and our judgment will, therefore, be for the plaintiff."

¹ Cp. *Alton v. Midland Railway Company*, 19 C. B. N. S. 213, and *ante*, 1181.

CHAPTER IV.

COMMON CARRIERS BY WATER.

I. *Of Goods.*

THERE are two theories with regard to common carriers by water. One, as stated by Brett, J., in *Nugent v. Smith*,¹ is that "every ship owner or master who carries goods on board his vessel for hire, is, in the absence of express stipulation to the contrary, subject, by implication, by the common law of England, adopting the law of Rome, by reason of the acceptance of the goods to be carried, to the liability of an insurer, except as against the act of God, or the Queen's enemies. It is not only such shipowners as have made themselves in all senses common carriers who are so liable, but all shipowners who carry goods for hire, whether inland, coastwise, or abroad, outward or inward. They are all within the exception to the general law of bailments, which (as before observed) was adopted into the common law from the Roman law."

Two theories with regard to common carriers by water.
I. That of Brett, J.

The other is expressed by Parsons in his *Law of Shipping*:² "The true rule undoubtedly is, that one who carries by water in the same way and on the same terms as a common carrier by land is also a common carrier; or, in other words, it is not the land or the water which determines whether a carrier of goods is a common carrier, but other considerations, which are the same in both cases." What the considerations essential to the constitution of a common carrier are we have already seen.³

II. That stated in Parson's *Law of Shipping*.

The rule as laid down by Parsons has received the adhesion of Cockburn, C.J., in the Court of Appeal in *Nugent v. Smith*.⁴ In that case, as the defendant was confessedly a common carrier, the necessity for deciding the question did not arise; and, as the other members of the Court refrained from giving any indication of their opinion, the view there taken by the Chief Justice, although commanding attention from the reasoning and learning by which it is fortified, is, strictly speaking, only an *obiter dictum*.

This latter theory approved by Cockburn, C.J.

¹ 1 C. P. D. 19, at 33.

² *Ante*, 1020 *et seqq.*

³ Vol. i. at 245.

⁴ 1 C. P. Div. 423, at 427.

Arguments in support of Brett, J.'s, theory:

1. That the English law of bailments is founded on the Roman law;

2. The Prætor's edict comprehended all ships;

3. So do the English cases;

4. Ambiguous words to be extended favourably to the hypothesis;

5. Impossible, on other grounds, to account for the use of bills of lading, &c.

First proposition. Denied by Cockburn, J.

Brett, J., supported his view by the following considerations: First, that "no one who has read the treatise of Mr. Justice Story on Bailments, the essay of Sir William Jones, and the judgment of Lord Holt, in *Coggs v. Bernard*, can doubt that the common law of England as to bailments is founded upon, though it has not actually adopted, the Roman law."¹

Secondly, that all ships were included in the Prætor's edict: *Ait Prætor, Nautæ, caupones, stabularii, &c.*

Thirdly, that the English cases recognized an universal, and not a mere partial, inclusion.

Fourthly, that where, as in *Elliot v. Rossell*,² ambiguous phrases, such as, "it must be regarded as a settled point in English law that masters and owners of vessels are liable, in port, and at sea and abroad, to the whole extent of inland carriers," &c., occur, "certainly, these are terms which seem to shew that, in the mind of the Chief Justice,³ all masters of all sea-going vessels were so liable, and, not only those who had made themselves common carriers, and thereby liable to carry the goods of all persons."

Fifthly, that "it seems impossible to account for the almost universal use of bills of lading by all sea-going ships, if a great number of them—viz., all who were not common carriers, would only be answerable for negligence, for which they are answerable notwithstanding the bill of lading."

Brett, J.'s, first proposition is denied by Cockburn, C.J., in the Court of Appeal from two points of view. "In the first place," he says,⁴ "it is a misapprehension to suppose that the law of England relating to the liability of common carriers was derived from the Roman law; for the law relating to it was first established by our courts with reference to carriers by land, on whom the Roman law, as is well known, imposed no liability in respect of loss beyond that of other bailees for reward."⁵

¹ 1 C. P. D. 19, at 28.

² *I.e.*, Kent, C.J.

³ 10 Johns. (Sup. Ct. N. Y.) 1.

⁴ 1 C. P. Div. at 428.

⁵ This statement is supported by a reference to the early law. But see Malynes, *Lex Mercatoria*, c. 17, "Of the beginning of Sea Laws;" c. 18, "Of the manner of Proceedings in Seafaring Causes;" c. 21, "Of the freighting of Ships, Charter-parties, and Bills of Lading;" also The Jurisdiction of the Admiralty of England asserted by Dr. Zouch. a treatise bound up with Malynes *Lex Mercatoria* (3rd ed.). Assertion I. That in all places where navigation and trade by sea have been in use and esteem, and particularly in England, special laws have been provided for regulating the same. Assertion II. That generally where laws have been provided for businesses concerning the sea, as also in England, several judges have been appointed to determine differences, and redress offences concerning the same. Assertion III. That in all places where judges have been appointed for sea businesses, as also in England, certain causes—viz., such as have relation to navigation, and negotiation by sea, have been held proper for their cognisance. Assertion IV. That the jurisdiction of the Admiral of England, as it is granted by the King, and is usually exercised in the Admiralty Court, may consist with the Statutes and Laws of this realm. There are other things not necessary here to be noticed. Cp., however, Admiralty, 12 Co. Rep. 79; *Articuli Admiraltatis*, 4 Co. Inst. 134; *Com. Dig.* Admiralty, Vin. Abr. Court. The Court of Admiralty.

Brett, J.'s, position in this regard is also denied, though from another point of view, by Mr. Holmes in *The Common Law*,¹ who claims that our law of bailment is of home origin: "a fragmentary survival from the general law of bailments."² In primitive times, only he who was in possession could say that he had lost property against his will; and the sole procedure by which property lost could be recovered, required an oath that the party had lost possession against his will. If, then, chattels were entrusted by their owner to another person, the bailee, and not the bailor, was the proper person to sue for their wrongful appropriation. If the bailee sold or gave the goods in his charge to another, the owner could only look to the bailee, and could not sue the stranger because no form of action existed which permitted him to do so. Moreover, as the remedies were all in the bailee's hands, he was bound to hold his bailor harmless; as he alone could recover the lost property he was bound to do so, and the security for his using his utmost endeavour was that in any event he was liable over to his bailor for the return of the property.

Denied from another point of view by Mr. Holmes.

In *Southcote's Case*,³ the old law is presented "pure and simple, irrespective of reward or any modern innovation."⁴ About this time two sets of duties came to be regarded—"one not peculiar to bailees arising from the assumpsit or public calling of the defendant";⁵ "the other, the ancient obligation peculiar to them as such, of which *Southcote's Case* is an example." Between the time of the decision in *Southcote's Case* and Holt, C.J.'s, judgment in *Coggs v. Bernard*,⁶ whenever a peculiar responsibility was imposed on bailees the declaration was sometimes an *assumpsit*, or more frequently alleged the public calling. No obligation peculiar to common carriers was alleged, but a custom peculiar to several classes, *e.g.*, bargemen, lightermen, &c. "The duties of a common carrier so far as the earlier evidence goes, were simply those of bailees in general, coupled with the liabilities generally attached to the exercise of a public calling."⁷ In *Coggs v. Bernard*, Holt, C.J., for the first time as a ground of discriminating the liabilities of the two classes, distinguishes between bailees for reward exercising a public employment and other bailees.⁸ As to the latter of these, he denies the rule in *Southcote's Case*, which, he says was confined to the former class, those exercising a public employment, and was applied to them on grounds of public policy.⁹ This distinction between bailees for reward exercising a public

Old law illustrated in *Southcote's Case*.

¹ 167, 175, 199; see *ante*, 899.

² (1601) 4 Co. Rep. 83 b; 1 Cro. (Eliz.) 815.

³ *The Common Law*, 182.

⁴ (1703) 2 Ld. Raym. 909.

⁵ *The Common Law*, 188.

⁶ See *per* Popham, C.J., *Woodlife's Case*, Moore 462, Owen 57.

⁷ *The Common Law*, 180.

⁸ *The Common Law*, 185.

⁹ *The Common Law*, 188.

calling and others is not Roman; and the bailee's liability is to be traced to Roman sources, neither in its origin nor in its subsequent limitation. Moreover, Holt, C.J.'s, strict rule is not confined to *navtæ*, *carpones* and *stabularii*, but is applied to all bailees for reward exercising a public calling, and the degree of responsibility attributed to them is precisely that of bailees in general, as worked out by previous decisions, and is quite different from and more strict than any obligations imposed by the Roman law.¹ Such is a bare abstract of the position established by Mr. Holmes, with great learning and acuteness, and which must be taken to supersede the views both of Brett, J., and Cockburn, C.J.

Cockburn,
C.J.'s, second
point.

Cockburn, C.J.'s, second point is that, as a matter of fact, the recognized law of England differs from the Roman law in that the Roman law afforded exemption to the carrier in all cases of unforeseen and unavoidable accident,² while the English law holds him liable, except in the case of the much narrower ground of exemption known as act of God; and Cockburn, C.J.'s, reasoning is that, one main point of the analogy sought to be established between the two systems of Roman and English law being shewn to be incorrect, the whole argument of Brett, J., on the point fails. Assuming the validity of Cockburn, C.J.'s, contention, Brett, J.'s, second proposition thereupon becomes irrelevant.⁴

Second
proposition.

Third
proposition.

As to the third, the Chief Justice carefully examines the cases, and shews that the conclusion drawn by Brett, J., does not necessarily follow from them. In *Liver Alkali Company v. Johnson*⁵ it should be noted that the defendant was held to incur the liability of a common carrier because he "was waiting for hire by any one."⁶ The argument, was that to make him liable, he should ply between two particular places; or that, because the course of his business was to carry the whole lading of his ship for one person, his liability should be less than the liability of one who carries the lading in different parcels for different people. It is plain from this that the point as to whether all ships were common carriers was not raised, though there is a *dictum* of Blackburn, J., that the decision in *Morse v. Slue*⁷ "has always been understood

¹ 2 Kent, Comm. 598; 1 C. P. Div. 199.

² *Damna, quæ imprudentibus accidunt hoc est damna fatalia, socii non cogentur præstare. Ideoque si pecus æstimatum datum sit et in latrocinio aut incendio perierit commune domum est, si nihil dolo aut culpa acciderit ejus qui æstimatum pecus acceperit. Quod si a furibus subreptum sit proprium ejus detrimentum est: D. 17, 2, 52, § 3.*

³ Mr. Holmes's conclusions coincide with those of Cockburn, C.J., *The Common Law*, 199.

⁴ Parsons, *Law of Shipping*, vol. i. 245, says: "That all ships which carry goods are to be treated as common carriers cannot be true; and the language used in relation to this subject is either inaccurate and loose, or is misunderstood because it is not interpreted by a reference to the facts of the case in which it is used."

⁵ L. R. 7 Ex. 267, L. R. 9 Ex. 338.

⁶ Per Blackburn, J., L. R. 9 Ex. at 340.

⁷ 1 Vent. 190, 238, 2 Keb. 866, 3 Keb. 72, 112, 135, Sir T. Raym. 220; Holmes, *The Common Law*, 192.

to apply equally to all ships employed in commerce and sailing from England.”¹ To this it may be objected that a ship employed in commerce would *prima facie* be a common carrier, and that nothing is said as to the possibility of repelling the inference, which is the material point.

Fourthly: In *Elliot v. Rossell*² the question was whether the fact of defendants being carriers to a foreign port made any difference in their liability. The nature of the case necessitated the admission that if they were within the jurisdiction they would be carriers. Consequently, the ambiguous words used by Kent, C.J., can be no further extended than to mean masters and owners of vessels are liable as common carriers on the high seas as well as in port—*i.e.*, if they are carriers in one place, they are in the other. Nothing is said as to whether all masters of ships are common carriers or not. Fourth proposition.

The fifth consideration in favour of his suggested rule, Brett, J., draws from “the almost universal use of bills of lading by all sea-going ships,”³ which he asserts as a fact and uses as an argument. Admitting the existence of the fact, the argument from it is at the best of no particular cogency. What there is a practice universally to do, is done most frequently without curious inquiry into the need to do it, or even as to its advisability. To press the argument back. How came bills of lading to be almost universally used? Those shipowners who were not common carriers would probably be in the first instance an inconsiderable proportion of the whole, and the minority would tend to assimilate their practice to that of the majority in all cases where an independent course did not carry with it any particular advantage.⁴ Fifth proposition.

The fact that a regular business of common carriers by sea existed would be some reason for persons, not common carriers but purposing to undertake carrying by sea, forming their terms of carriage with reference to the existing practice of common carriers. It would be a natural thing for those not legally liable to the obligations of a common carrier to express the terms on which they carried, by reference to the document accustomed to be used by common carriers to define and limit the terms of carriage, rather than to rest satisfied with the indefinite obligations that legal interpretation might attach to their undertaking. It plainly does not follow that because a practice is generally observed, such observance is attributable to any one exclusive cause.

¹ L. R. 9 Ex. at 341.

² 10 Johns. (Sup. Ct. N. Y.) 1.

³ 1 C. P. D. at 33.

⁴ Perhaps the conclusive answer to Brett, J., is, that a bill of lading “is assignable in its nature, and by indorsement the property is vested in the assignee”: *Caldwell v. Ball*, 1 T. R. 205; at 216. This is a distinct advantage attaching to the giving a bill of lading which is adequate to explain its universal use.

Parsons' contention that all general ships would be excluded from the liability of the common carrier.

Parsons, in his Law of Shipping, contends that all general ships would be excluded from the liability of common carriers by the terms of his rule.¹ This conclusion he arrives at,² though the definition of the contract made by the master or owner of a general ship, given in Abbott's Law of Merchant Ships³—viz., a contract "by which the master and owners of a ship destined on a particular voyage engage separately, with a number of persons unconnected with each other, to convey their respective goods to the place of the ship's destination." The point of view of Dr. Parsons seems to be attained by looking upon this definition of the contract as assuming a voyage altogether unaccustomed, not merely in direction, but in character. There is another view, which, while recognizing the distinctive marks of the particular voyage, involves an assumption that the particular voyage is one voyage, with its own distinctive marks, in a series of voyages, all of which are concerned with the common purpose of carrying goods. Now in either view the definition is imperfect, as it fails to indicate the possible ambiguity. If the former meaning is that which alone is to be imposed, the proposition is true, but insignificant. The man who carries a few kegs of spirits for several friends in his yacht would seem no more thereby to constitute his vessel a general ship than the person who packs up knick-knacks for his friends in his travelling carriage would thereby constitute himself a common carrier. If the latter is the meaning, then the conclusion indicated does not follow—that is, that shippers so engaged are not common carriers.

Ground of such an opinion.

Examined.

The ground of such an opinion seems to be that the course of business of a shipowner engaged in carrying goods with a general ship is not the performance of a *quasi* public duty, but the contracting of an engagement whose terms are not supplied by law independently of the act of the parties. Now to constitute the employment of a common carrier, in England at least, the carrying on any invariable set of conditions expressed or implied is not necessary. We have seen⁴ that the discriminating mark of the common carrier is "whether he carries for particular persons only, or whether he carries for everyone";⁵ and, in the more obvious meaning of the terms we are considering, that is precisely what happens with regard to a general ship. The carrier does not hold himself out to make a *particular* bargain with a particular person, but rather a particular bargain with any person of, may

¹ Parsons, Law of Shipping, vol. i. 248, and the whole of section viii., Of Ships as Common Carriers. See also 3 Kent, Comm. (12th ed.), 217, note 1.

² *L. c.* at 249.

³ At 119 (13th ed.).

⁴ *Ante*, 1022 and 1049.

⁵ *Ingate v. Christie*, 3 C. & K. 61, cited, with approval, in *Liver Alkali Company v. Johnson*, L. R. 9 Ex. 338, at 343.

be, a particular class. This, however, Dr. Parsons denies, as matter of fact, ever to happen. He says, "it is by no means unusual for the master or owner of a general ship to refuse to take the goods of all who offer."¹ But the common carrier is only bound to take goods for carriage *according to his profession*. As Parke, B., points out in the case of innkeepers, an innkeeper may keep an inn only for those who come in their carriages.² By parity, the same may be the case with a general carrier. If it is asserted that a general carrier refuses to take the goods of all who offer (1) when the offer is within the limits of his profession, (2) when he has room, (3) the goods are suitable, and (4) the price is secured, Dr. Parsons' proposition is proved. If anything short of this is set up, the proof is irrelevant; as it stands the so-called proof is a mere *petitio principii*. The shipowner, such is the argument, is not carrier in law, because he is not in fact: while of this assertion that he is not a carrier in fact, no proof is attempted.

However the matter may be in general reasoning, in this country it is settled by authority. Thus, in *Laveroni v. Drury*,³ Pollock, C.B., says: "By the law of England, the master and owner of a general ship are common carriers for hire, and responsible as such." The point is also directly involved in *Liver Alkali Company v. Johnson*,⁴ where a barge-owner let out vessels for the conveyance of the goods of any customer who applied to him, and the fact that he only took the goods of one person in one vessel was held not to make any difference in the liability he was under. True, in this case, the decision only goes to the extent that the "defendant has the liability of a common carrier," without deciding that he is one; and the point that would arise out of Dr. Parsons' assertion of fact, that it is by no means unusual for the master or owner of a general ship to refuse to take the goods of all who offer, as a ground of liability was left undetermined. The course of the case indicates this to be rather a test than *the* test.⁵

¹ Vol. i. 249 n.

² *Johnson v. Midland Railway Company*, 4 Ex. 367, at 371; *ante*, 1027.

³ 8 Ex. 166, at 170. In *Kay v. Wheeler*, L. R. 2 C. P. 302, the Ex. Ch. avoided giving an opinion on the point.

⁴ L. R. 9 Ex. 338. *Ante*, 1022 and 1053.

⁵ See *Story*, Bailm. § 501; *Sewall v. Allen*, per *Savage*, C.J., 6 Wend. (N. Y.) 335, at 343; *Gage v. Tirrell*, 91 Mass. 299, per *Bigelow*, C.J., at 302; *Nugent v. Smith*, 1 C. P. Div. 423, per *Cockburn*, C.J., at 430. "Where a ship is not chartered wholly to one person, but the owners offer her generally to carry the goods of any merchants who may choose to employ her, or where one merchant to whom she is chartered offers her to several sub-freighters for the conveyance of their goods, she is called a general ship": 1 *Maude and Pollock*, *Merchant Shipping* (4th ed.), 338. The dispute may very probably be resolved into a question of definition, for there is no doubt that a "general ship" may be so defined as to exclude the notion of liability as a common carrier, while equally undoubtedly the definition is often so framed as to

In England the point settled by authority. *Laveroni v. Drury*.

Liver Alkali Company v. Johnson.

Law in the
United States.
The Montana
Case.

The conclusion arrived at in America is the same. "By the settled law," says Gray, J., delivering the unanimous decision of the Supreme Court of the United States in *Liverpool and Great Western Steam Company v. Phenix Insurance Company*,¹ "in the absence of some valid agreement to the contrary, the owner of a general ship carrying goods for hire, whether employed in internal, in coasting, or in foreign commerce, is a common carrier with the liability of an insurer against all losses except only such two irresistible causes as the act of God and public enemies."²

Jury to find
whether the
holding out is
that of a
common
carrier.

The determination of whether the inference is to be drawn that the carrier has held himself out as a common carrier, and whether the agreement between the parties constitutes the relation in the particular case, is for the jury,³ subject of course to there being any evidence from which the conclusion *can* be drawn.⁴

Liability most
largely
determined
by special
contracts.

The liability of ship owners and masters is largely limited by the use of bills of lading as records of the terms on which goods are contracted to be conveyed. Under bills of lading precisely identical obligations attach to the owners and the master in regard to shipments, whether they act as general or common carriers, or simply as carriers *pro hac vice*; since bills of lading ascertain and fix and control the liability, and the exceptions therein contained cover the usual risks not taken by the owners.⁵

Jettison.

Before considering them there is one state of things peculiar to the maritime law, on the occurrence of which the shipowner is not liable for damage to the shippers; that is, where goods have been intentionally thrown overboard during the course of a voyage in order to save the ship and the remainder of the cargo from a danger common to the whole adventure. Where this happens, the owner whose goods are sacrificed has a right to contribution towards his loss from those whose property is saved, including the ship itself.⁶

Definition in
"Termes de
la Ley."

In "Termes de la Ley" is the following: "Jetsam is, when a ship is in danger to be cast away, and to disburthen the ship, the

include the liability; and whatever the definition the notion of liability of a common carrier most commonly attaches.

¹ 129 U. S. (22 Davis) 397, at 437.

² For his proposition he cites Molloy, bk. 2, c. 2, § 2; Bac. Abr. Carriers (A); *Barclay v. Cuculla y Gana*, 3 Doug. 389; 2 Kent, Comm. 598, 599; Story, Bailm. § 501; *The Niagara*, 21 How. (U. S.) 7, at 23; *The Lady Pike*, 21 Wall. (U. S.) 1, at 14.

³ *Tamvaco v. Timothy, C. & E. I. Cp. Tate v. Hyslop*, 15 Q. B. Div. 368. In the Admiralty Division there is no absolute right to a jury in cases where there was no right before the passing of the Judicature Acts, but the judge has a discretion: *The Temple Bar*, 11 P. Div. 6. In *The Orwell*, 13 P. D. 80, the plaintiff was allowed a jury in an action under Lord Campbell's Act under R. S. C. 1883, Order xxvii. r. 4.

⁴ *Ante*, 151.

⁵ *Pope v. Nickerson*, 3 Story (U. S.) 465, per Story, J., at 473; see also *Commander-in-Chief*, 1 Wall. (U. S.) 43. *Post*, 1282.

⁶ 3 Kent, Comm. 232, and (12th ed.), Mr. Holmes's note, at 234, *General Average*; Abbott, *Merchant Ships* (13th ed.), 625-668.

mariners cast the goods into the sea; and although afterward the ship perish, none of those goods called jetsam, flotsam, or lagan are called wreck as long as they remain in or upon the sea; but if any of them are driven to land by the sea, there they shall be reputed wreck and pass by the grant of wreck."¹

"The principle of this general contribution," says Abbott, "is known to be derived from the ancient law of Rhodes, being adopted into the Digest of Justinian with an express recognition of its true origin."²

To justify the application of the rule as to average contribution the sacrifice must be made in conformity with certain conditions:

(1) The danger must not have been produced by the thing sacrificed; this requirement is made on the ground of the manifest injustice of permitting him whose act or default imperilled the whole adventure to claim recompense from those whose property he had jeopardised.³

(2) The danger must have threatened not a part merely, but the whole adventure.⁴

(3) The danger must be apparently inevitable if the sacrifice is not made.⁵

¹ The reference for this is Sir Henry Constable's Case, 5 Co. Rep. 106 a. See also Butler v. Wildman, 3 B. & Ald. 398; Dickenson v. Jardine, L. R. 3 C. P. 639; Parsons, Law of Shipping, vol. i. 347.

² (13th ed.), 626, where the authorities are collected. See also Black Book of the Admiralty (Twiss's ed.), vol. ii., Judgments of the Sea, 219, §§ 8-11, vol. iv., The Amalphitan Table, 31, §§ 47-49, where is the following: "Likewise, if the merchants be avaricious persons, such as are found in the world, who would rather die than lose anything, who from extreme avarice would not consent to the jettison, but oppose it, thereupon the master with the mate and the other officers of the vessel, having held a council, ought to insist on it," &c. The rest of the leading codes of ancient sea laws are set out in the same volume. *Lege Rhodia cavetur ut, si levandæ navis gratiâ jactus mercium factus sit, omnium contributione sarcinatur, quod pro omnibus datum est*: D. 14, 2, 1. This title of the Digest—*De Lege Rhodia De Jactu*—may be here generally referred to as containing the doctrines of the civil law on the subject. See also Paul. Sent. Rec. 2, 7. Moyle, Just. Inst. 2, 1, 48, refers to Aristotle, Ethics, 3, 1, containing the general definition of the Voluntary. The first mention of contribution towards jettison in the English law, and that only incidentally, is in Mousse's Case, 12 Co. Rep. 63. See, for the history of the law, Birkley v. Presgrave, Tudor L. C. on Mercantile Law (3rd ed.), 92 *cum notis*; Pirie v. Middle Dock Company, 44 L. T. 426, at 428. There is a conflict of authority as to whether this right of jettison arises from an implied contract or is founded on natural justice alone. The former view is advocated by Bramwell, L.J., Wright v. Marwood, 7 Q. B. Div. 62, at 67; the latter by Brett, M.R., Burton v. English, 12 Q. B. Div. 218, at 220. See The Marpeasa (1891), P. 403; The Brigella (1893), P. 189, at 195. General Average is ably treated in Bell, Comm. (7th ed.), 629-678.

³ Schloss v. Heriot, 14 C. B. N. S. 59; Johnson v. Chapman, 19 C. B. N. S. 563. See, too, Wright v. Marwood, 7 Q. B. Div. 62, where Johnson v. Chapman is considered, at 69; Burton v. English, 10 Q. B. D. 426, 12 Q. B. Div. 218; Strang v. Scott, 14 App. Cas. 601.

⁴ Nesbitt v. Lushington, 4 T. R. 783; Walthew v. Mavrojan, L. R. 5 Ex. 116 (Ex. Ch.). There must be a danger, actual or impending, common to both ship and crew; Whitecross Wire Company v. Savill, 8 Q. B. Div. 653. The difference between the English and American law of general average is indicated in Royal Mail Steam Packet Company v. English Bank of Rio Janeiro, 19 Q. B. D. 362, where the leading American cases are cited, at 366. See Svendsen v. Wallace, 10 App. Cas. 404, where Atwood v. Sellar, 5 Q. B. Div. 286, is discussed at 417; also Rose v. Bank of Australasia (1894), App. Cas. 687.

⁵ Harrison v. Bank of Australasia, L. R. 7 Ex. 39; Lawrence v. Minturn, 17 How.

In jettison the sacrifice must conform to five conditions.

(4) The danger must have caused the casting away. It is not sufficient if the casting away was of something that could not be saved at the time it was cast away.¹

(5) The mind and agency of man must be employed.²

Deck cargo.

If the goods are on the deck, which is not generally the proper place for the stowage of cargo, this does not entitle their owner to contribution.³

Notwithstanding this, however, the owner of deck goods jettisoned, though not entitled to general contribution, may still have a good claim for indemnity against the master and owners who received his goods for carriage upon deck; and he may have a good claim against the other owners, (1) in cases where the established custom of navigation permits deck cargoes, and (2) where the other owners of cargo have consented that the goods jettisoned should be carried as deck cargo.⁴

The earliest statement of the law of jettison in Mouse's case.

Mouse's Case⁵ has been cited as the earliest decision in the English law as to jettison. A casket was cast into the river in order to lighten a ferry boat caught by a great storm and tempest, whereby the passengers' safety was jeopardized. It was held that, "if a tempest arise in the sea, *levandi navis causa*, and for salvation of the lives of men, it may be lawful for passengers to cast over the merchandises," &c. The act in question was done by the interference of a passenger, and not by the master, by whom the

(U. S.) 100. As Blackburn, J., says in *Wilson v. Bank of Victoria*, L. R. 2 Q. B. 203, at 213, there must be "expenditure which is not only extraordinary in its amount, but is incurred to procure some service extraordinary in its nature."

¹ *Shepherd v. Kottgen*, 2 C. P. D. 578, at 585. It must be "a voluntary and intentional sacrifice . . . under the pressure of imminent danger, and for the benefit, and with a view to secure the safety, of the whole adventure": *Stewart v. West India and Pacific Steamship Company*, L. R. 8 Q. B. 88, at 93, in Ex. Ch. L. R. 8 Q. B. 362. But, says Benecke, *Marine Insurance*, at 171: "The moment of the greatest distress cannot be waited for." See *The Bona*, 11 Times, L. R. 40, affirmed 209.

² *Abbott, Merchant Ships* (13th ed.), 627.

³ *Gould v. Oliver*, 4 Bing. N. C. 134; *Milward v. Hibbert*, 3 Q. B. 120. As to a custom to carry deck cargo. *Wright v. Marwood*, 7 Q. B. Div. 62; *Burton v. English*, 10 Q. B. D. 426, 12 Q. B. Div. 218; *Royal Exchange Shipping Company v. Dixon*, 12 App. Cas. 11; *Lowndes, Law of General Average* (4th ed.), 62. See also *Hurley v. Milward, Jones & Carey* (Ir. Ex.) 224. Goods stowed on deck without the consent of the owner are understood to be at the risk of the master. In the case of loss he cannot exempt either himself or the vessel from liability under a contract within the exception of dangers of the seas, unless the dangers were such as would have occasioned the loss had the goods been safely stowed under deck: *The Rebecca, Ware* (U. S. Dist. Ct.) 188, at 211; *Dodge v. Bartol*, 5 Greenleaf (Me.) 286, where it is said, at 289, citing *Valin Ordonnance de la Marine*, liv. 3, tit. 8, art. 13: "This rule does not apply to boats and small vessels, which sail from port to port; where it is customary to load goods on deck, as well as in the hold;" *Pontifex v. Hartley*, 8 Times L. R. 657. In *Royal Mail Steam Packet Company v. English Bank of Rio de Janeiro*, 19 Q. B. D. 362, cargo discharged before the commencement of extraordinary measures for getting off a stranded ship was held not liable to contribute to expenses. See sec. 451 of *Merchant Shipping Act 1894* (57 & 58 Vict. c. 60), with reference to deck loads of timber.

⁴ *Strang v. Scott*, 14 App. Cas. 601.

⁵ 12 Co. Rep. 63. Sir Henry Constable's Case, 5 Co. Rep. 106, in which the nature of jettison or, as it is there spelled, jetsam is considered, is an action for taking wreck in prejudice of the rights of the lord of the manor. See *Bird v. Astcock*, 2 Bulst. 280.

act is more usually determined on, and who is responsible for what is done;¹ nevertheless it was held to be "lawful to the defendant, being a passenger, to cast the casket of the plaintiff out of the barge, with the other things in it; for *quod quis ob tutelam corporis sui fecerit, jure id fecisse videtur*."

There must be no negligence on the part of the responsible person, either in the act of jettison² or in guarding against the perils which in the last resort render it necessary;³ and this absence of negligence is exacted, not merely in this instance, but in all cases where there is an exception to the ordinary carrier's liability, whether on land or sea.⁴

"It is settled law that in the case of a general ship, the owner of goods sacrificed for the common benefit has a lien upon each parcel of goods salvaged belonging to a separate consignee for a due proportion of his individual claim. The cargo not being in his possession or subject to his control, his right of lien can only be enforced through the shipmaster, whom the law of England, following the principles of the *Lex Rhodia*, regards as his agent for that purpose. The duty being imposed by law upon the master, he is answerable for neglect of it";⁵ and in *Crooks v. Allan*⁶ the defendants, who had neglected to perform their duty in this respect, were compelled to pay the whole amount of the contribution.

Besides this remedy, each owner of jettisoned goods has a direct claim against each owner of cargo for a *pro rata* contribution.

¹ *The Gratitude*, 3 C. Rob. (Adm.) 240, at 258. *Tudor, L.C.*, on *Mercantile Law* (3rd ed.), 34; *Dupont de Nemours & Co. v. Vance*, 19 How. (U. S.) 162. *Price v. Noble*, 4 Taunt. 123, where the question of whether goods can be jettisoned by other than the master, was distinctly raised and decided. See *Butler v. Wildman*, 3 B. & Ald. 398, as to the extent to which the right is recognized; also *Notara v. Henderson*, L. R. 7 Q. B. 225, at 236; *Whitcross Wire Company v. Savill*, 8 Q. B. Div. 653.

² If cargo is jettisoned without due cause, the owner will have a right of action against the shipowner for the whole of his loss: *Whitcross Wire Company v. Savill*, 8 Q. B. Div. 653, per Brett, L.J., 663.

³ *Clark v. Barnwell*, 12 How. (U. S.) 272; per Nelson, J., at 280, "although the loss occurs by a peril of the sea, yet if it might have been avoided by skill and diligence at the time, the carrier is liable. But in this stage and posture of the case the burden is upon the plaintiff to establish the negligence, as the affirmative lies on him," citing *Muddle v. Stride*, 9 C. & P. 380; or, as the principle is stated, *General Mutual Insurance Company v. Sherwood*, 14 How. (U. S.) 351, at 365, "if damage be done by a peril insured against, and the master neglects to repair the damage, and in consequence of the want of such repairs the vessel is lost, the neglect to make repairs and not the sea damage has been treated as the proximate cause of the loss." See also *Sjordet v. Hall*, 4 Bing. 607; *The Freedom*, L. R. 3 P. C. 594, commented on as to a passage at 601, in *The Chasca*, L. R. 4 A. & E. 446; and per Lindley, L.J., *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Company*, 10 Q. B. Div. 521, at 542.

⁴ *Czech v. General Steam Navigation Company*, L. R. 3 C. P. 14; *The Figlia Maggiore*, L. R. 2 A. & E. 106. *Taylor v. Liverpool and Great Western Steam Company*, L. R. 9 Q. B. 546, was decided on the ground of a failure to prove that the loss for which defendant was *prima facie* liable, was within the exceptions.

⁵ Per Lord Watson, *Strang v. Scott*, 14 App. Cas. 601, at 606, where *Hallett v. Bosfield*, 18 Ves. 187 is considered.

⁶ 5 Q. B. D. 38.

towards his indemnity, which may be recovered by action at law.¹ Yet where the negligence of the master has occasioned the peril necessitating the jettison, the shipowners are not entitled to recover against the owners of cargo, but will be liable to the owners of the goods jettisoned for the damage caused by the wrongdoing of the master,² unless the ordinary relations of the goods' owner to the shipowner has been altered by a contract that the shipowner shall not be responsible for the negligence of his servants.³

Ships presumed to be fit for the purpose to which it is applied.

We have seen that the law regards common carriers of goods as insurers;⁴ and thus as against the carrier the ship is presumed to be fit for the purpose for which it is used.⁵ The principle is stated by Lord Blackburn in *Steel v. State Line Steamship Company*⁶ "to be quite clear, both in England and in Scotland, that, where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading or any other form, there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy; and I think, also, in marine contracts, contracts for sea carriage, that is what is properly called 'a warranty,' not merely that they should do their best to make the ship fit, but that the ship should really be fit." Further on, in the course of the same judgment,⁷ Lord Blackburn intimates his clear opinion that a stipulation excepting the shipowner from liability for his own negligence is not invalid as against public policy or for any other cause.⁸

Want of knowledge no excuse.

Want of knowledge of defects, however, does not excuse the shipowner.⁹ His obligation is absolute unless he is prevented by

¹ *Dobson v. Wilson*, 3 Camp. 480.

² *Strang v. Scott*, 14 App. Cas. 601.

³ *The Carron Park*, 15 P. D. 203.

⁴ *Ante*, 1058.

⁵ "The law presumes a promise to that effect on the part of the carrier without any actual proof; and every reason of sound policy and public convenience requires it should be so": per Lord Ellenborough in *Lyon v. Mells*, 5 East 428, at 437.

⁶ 3 App. Cas. 72, at 86; cp. *Gilroy v. Price* (1893), App. Cas. 56.

⁷ 3 App. Cas. at 88. Cp. *The Carron Park*, 15 P. D. 203; *The Accomac*, 15 P. Div. 208.

⁸ The American view is that the fundamental principle upon which the law of common carriers was established, was to secure the utmost care and diligence in the performance of their duties; an end secured in regard to goods by charging the common carrier as an insurer, and in regard to passengers by exacting the highest degree of carefulness and diligence; so that a carrier who stipulates not to be bound to the exercise of care and diligence, in the view of American law seeks to put off the essential duties of his employment, and this endeavour the law invalidates as against public policy. See this view very fully stated by Gray, J., in *Liverpool and Great Western Steam Company v. Phenix Insurance Company*, 129 U. S. (22 Davis) 397, at 439-441. But an insurance by the common carrier against loss arising from the negligence of his own servants, has been held good by the very highest authority: *Phoenix Insurance Company v. Erie Transportation Company*, 117 U. S. (10 Davis) 312, approved *California Insurance Company v. Union Compress Company*, 133 U. S. (26 Davis) 387.

⁹ *The Edwin I. Morrison*, 153 U. S. (46 Davis) 199.

perils of the sea or unavoidable accident, and will be implied where there is no express contract.¹ Yet the stipulation of seaworthiness is not so far a condition precedent that the hirer is not liable on breach of his contract by the shipowner for any of the charter money. The charterer is bound to pay for the use of the ship to the extent to which it goes. Again, if a defect, without any apparent cause, be developed, such defect is presumed to have been in existence when the service began.² Unless then the shipowner has contracted himself out of his common law liabilities, he undertakes responsibility for all defects, even those undiscoverable by the closest and most careful scrutiny,³ if their existence is incompatible with the reasonable fitness of the ship.

The condition of the ship must be suitable with regard to the particular purpose to which it is to be put,⁴ and not only structurally fit, but furnished with a competent crew, officers, and general arrangements.⁵ Thus, in *Kopitoff v. Wilson*⁶ the plaintiff sought to recover damages for the loss of a large number of iron armour-plates, which were lost by reason of one of the plates breaking loose after the ship had been out to sea for some hours, causing the loss of the ship and the plates. The plaintiff contended that the breaking loose of the plates was caused by improper stowage; the defendants, that it was a direct consequence of the roughness of the sea, which was a peril excepted in the bill of lading. The Queen's Bench Division held, that the merchant, by his contract with the shipowner, is protected against the damage arising from such perils acting upon a seaworthy ship. "We hold," said Field, J.,⁷ "that in whatever way a contract for the conveyance of merchandise be made, where there is no agreement to the contrary the shipowner is, by the nature of the contract, impliedly and necessarily held to warrant that the ship is good, and is in a condition to perform the voyage then about to be undertaken, or, in ordinary language, is seaworthy, that is, fit to meet and undergo

"Suitable" means not only structurally fit, but furnished with competent crew, officers, and general arrangements. *Kopitoff v. Wilson*.

Judgment of Field, J.

¹ 3 Kent, Comm. 205. In *The Schooner Sarah*, 2 Sprague (U. S. Adm.) 31, a ship was held unseaworthy where only the master was on board. "He should either have kept his crew with him or, if it was necessary to let them go home for any purpose, he should have procured suitable and competent persons in their place."

² *Work v. Leathers*, 97 U. S. (7 Otto) 379.

³ *The Glenfruin*, 10 P. D. 103; *Backhouse v. Snead*, 1 Murph. (N. Ca.) 173, cited Parsons, Law of Shipping, vol. i. 285, where the rudder of the ship was internally defective, although outwardly sound, and it breaking in a storm, the ship was wrecked and some corn, which was on board was lost. The shipowner was held liable. See also *Dupont de Nemours & Co. v. Vance*, 19 How. (U. S.) 162, at 167. As to the law where there is a bill of lading with a clause "warranted seaworthy only so far as ordinary care can provide": *Cargo ex Laertes*, 12 P. D. 187.

⁴ *Stanton v. Richardson*, L. R. 7 C. P. 421, L. R. 9 C. P. 390, affirmed in the House of Lords (see per Field, J., 1 Q. B. D. 381).

⁵ *Clifford v. Hunter*, M. & M. 103; *Forshaw v. Chabert*, 3 B. & B. 158.

⁶ 1 Q. B. D. 377.

⁷ L. c. at 380.

the perils of the sea and other incidental risks to which she must of necessity be exposed in the course of the voyage."

Erle, J.'s, test of efficiency.

The shipowner is not bound to provide a perfect vessel—one that is the best and fittest for the purpose for which it has to serve—but, to adopt the definition given by Erle, J., in the House of Lords in *Gibson v. Small*,¹ one that before setting out "is fit in the degree which a prudent owner uninsured would require to meet the perils"² of such a voyage as it is reasonable to anticipate for it. It is manifest this power must be constantly rising as the arts of naval construction improve. Thus, what in one age would be looked on as the act of God, to the extent that loss arising therefrom would be excused as within the exception, may, in a succeeding age, be regarded as a loss brought about by an unfitness to encounter perils, which it would be usual and prudent and of course to require provision against at the commencement of a voyage.³

Seaworthiness to be determined at the time the goods were received on board.

The seaworthiness of the ship is to be determined at the time the goods were received on board,⁴ as well as at the time of sailing with the cargo. So that if, in the interval between the reception of the goods and the commencement of the voyage, the ship becomes unfit, the liability attaches,⁵ though not if the

¹ 16 Q. B. 128, in Ex. Ch. at 141, in H. of L. 4 H. L. C. 353. In *Dudgeon v. Pembroke*, 2 App. Cas. 284, at 293, Lord Penzance, speaking on the question of whether the law implies a warranty of seaworthiness in a time policy, said: "I do not propose to trouble your Lordships by reviewing the arguments on this question, because I consider that the case of *Gibson v. Small* (4 H. L. C. 353), supplemented as it was by the two cases of *Thompson v. Hopper* (6 E. & B. 172), and *Fawcus v. Sarsfield* (6 E. & B. 192), must be considered to have set at rest the controversies on this subject, and to have finally decided that the law does not, in the absence of special stipulations in the contract, infer in the case of a time policy, any warranty that the vessel at any particular time shall have been seaworthy. In pronouncing the judgment of the majority of the Court in the latter case, Lord Campbell said: 'For the reasons I gave in the case of *Gibson v. Small*, and which I have given in the case of *Thomson v. Hopper*, I think there is no implied warranty of seaworthiness in any time policy.'"

² 4 H. L. C. at 384.

³ *Burges v. Wickham*, 3 B. & S. 669, per Blackburn, J., at 693, commenting on and approving the remark of Story, J., in *Tidmarsh v. The Washington Fire and Marine Insurance Company*, 4 Mason (U.S.) 439, at 441, that "the standard of sea-worthiness has been gradually raised within the last thirty years." In *Knill v. Hooper*, 2 H. & N. 277, at 283, Watson, B., delivering the judgment of the Court, said: "The term 'sea-worthiness' is a relative term: there is no positive condition of the vessel recognized by the law to satisfy the warranty of sea-worthiness." Cp. *Readhead v. Midland Railway Company*, L. R. 2 Q. B. 412, at 440. As to seaworthiness with regard to deck cargo, see *Daniels v. Harria*, L. R. 10 C. P. 1; *Lawrence v. Minturn*, 17 How. (U. S.) 100.

⁴ *Tattersall v. National Steamship Company*, 12 Q. B. D. 297.

⁵ *Cohn v. Davidson*, 2 Q. B. D. 455; *Dudgeon v. Pembroke*, 2 App. Cas. 284, at 296, per Lord Penzance: "The underwriters would be at liberty in every case of a voyage policy to raise and litigate the question whether, at the time the loss happened, the vessel was, by reason of any insufficiency at the time of last leaving a port where it might have been repaired, unable to meet the perils of the seas, and was lost by reason of that inability"; *Steel v. State Line Steamship Co.*, 3 App. Cas. 72. But though the owner is not bound to repair during the voyage, if he elect to do so he ought not to proceed with the vessel in an unseaworthy condition, *Worms v. Storey*, 11 Ex. 427. "Although the *onus* of proving unseaworthiness is on the underwriters, yet I agree that, if a vessel were shewn to be lost by leaking as soon as she left the

unseaworthiness is posterior to the commencement of the voyage.¹

Parke, B.'s, definition of seaworthiness in *Dixon v. Sadler*,² is the one most often referred to. The term, he says, implies that the ship "shall be in a fit state as to repairs, equipment, and crew, and in all other respects to encounter the ordinary perils of the voyage . . . at the time of sailing upon it."

In the House of Lords, in *Steel v. State Line Steamship Company*,³ the question of seaworthiness, the determination of whether the duty or obligation to make the ship reasonably fit for the voyage has been discharged,⁴ was agreed to be one for the jury. As to this, "I think," said Lord Blackburn,⁵ "that there are some views of the case in which, though it would still be a question of fact for the jury, there could not be much doubt about it one way or the other. If, for example, this port was left unfastened, so that when any ordinary weather came on, and the sea washed as high as the port, it would be sure to give way and the water come in, unless something more was done—if in the inside the wheat had been piled up so high against

Parke, B.'s, definition of seaworthiness in *Dixon v. Sadler*.

Seaworthiness for the jury.

Lord Blackburn's opinion in *Steel v. State Line Steamship Company*.

port, the *onus* of proving her capacity for the sea would be shifted": per Willes, J., *Davidson v. Burnand*, L. R. 4 C. P. 117, at 120. "A defect of seaworthiness arising after the commencement of the risk, and permitted to continue from bad faith or want of ordinary prudence or diligence on the part of the insured or his agents, discharges the ordinary insurer from liability for any loss which is the consequence of such bad faith, or want of prudence or diligence; but does not affect the contract of insurance as to any other risk or loss covered by the policy and not caused or increased by such particular defect": *Union Insurance Company v. Smith*, 124 U. S. (17 Davis) 405, at 427. *Thiodon v. Tindall*, 60 L. J. Q. B. 526, was a claim against the Committee of Lloyd's by the purchaser of a yacht with a certificate classing her as A1 for eleven years; subsequently to the purchase it was discovered she was not entitled to the classification, and the purchaser sued the committee, alleging he had been induced to purchase by their misrepresentation in the certificate. He was held disentitled to recover.

¹ *The Rona*, 51 L. T. 28. As to dunnage, see Abbott, *Merchant Ships* (13th ed.), 391. It is sufficient if the master provides the kind of dunnage ordinarily used at the port of shipment for goods of the kind shipped: *The Ville de l'Orient*, 2 L. T. (N. S.) 62.

² 5 M. & W. 405, at 414, in Ex. Ch. 8 M. & W. 895, Tudor, L.C., on *Mercantile Law* (3rd ed.), 127 *cum notis*. See also *Davidson v. Burnand*, L. R. 4 C. P. 117, *The Quebec Marine Insurance Company v. The Commercial Bank of Canada*, L. R. 3 P. C. 234, where Lord Tenterden's *dictum* in *Weir v. Aberdeen*, 2 B. & Ald. 320, is commented on. See also *Gilroy v. Price* (1893), App. Cas. 56; Abbott, *Merchant Ships* (13th ed.), 376-389; *Hedley v. Pinkney* (1894), App. Cas. 222.

³ (1877) 3 App. Cas. 72, where, at 77, Lord Cairns, C., says: "By seaworthy—I do not desire to point to any technical meaning of the term, but to express that the ship should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter in crossing the Atlantic"; and at 89, Lord Blackburn describes the owner's obligation as to seaworthiness as "the duty or obligation to make the ship reasonably fit for the voyage." See *The Carron Park*, 15 P. D. 203; *Tattersall v. National Steamship Company*, 12 Q. B. D. 297; *Adam v. Morrie*, 18 Rettle 153, at 156; *Gilroy v. Price* (1893), App. Cas. 56.

⁴ 3 App. Cas. 72, per Lord Blackburn, at 90.
⁵ L. c. at 90. A covenant of seaworthiness is not to be construed as a condition precedent where the freighter has taken the ship into his service and used her. "If," said Lord Ellenborough, *Havelock v. Geddes*, 10 East 555, at 563, "this were a condition precedent, the neglect of putting in a single nail for a single moment after the ship ought to have been made tight, staunch, &c., would be a breach of the condition and a defence to the whole of the plaintiff's demand." This was followed in *Inman Steamship Company v. Bischoff*, 7 App. Cas. 670, at 673, 683.

it and covered it, so that no one would ever see whether it had been so left or not, and so that if it had been found out or thought of, it would have required a great deal of time and trouble (time above all) to remove the cargo to get at it and fasten it—if that was found to be the case, and it was found that at the time of sailing it was in that state, I can hardly imagine any jury finding anything else than that a ship which sailed in that state did not sail in a fit state to encounter such perils of the sea as are reasonably to be expected in crossing the Atlantic. I think, on the other hand, if this port had been, as a port in the cabin or some other place would often be, open, and when they were sailing out under the lee of the shore remaining open but quite capable of being shut at a moment's notice, as soon as the sea became in the least degree rough, and in case a regular storm came on capable of being closed with a dead light—in such a case as that no one could, with any prospect of success, ask any reasonable people, whether they were a jury or judges, to say that that made the vessel unfit to encounter the perils of a voyage."

Seville
Sulphur and
Copper Com-
pany v. Colvils.

When, however, the criteria of Lord Blackburn came to be applied in another Scotch case,¹ there was a difference of opinion amongst the judges. The action was by charterers against ship-owners for damages for loss of cargo. The vessel was lost in consequence of the breakdown of the boiler through the amount of mud in the water, which was drawn from the Guadalquivir, a river of exceptional muddiness. The Lord Justice-Clerk (Moncreiff) held that the facts proved made out "a stronger case than that of Steel, for in that case there was no structural defect, only careless stowage of the cargo, which prevented one of the port-holes from being closed. But the propelling power of a sea-going ship is of its essence, and if this vessel for the time had none it could not be seaworthy."² On the other hand, Lord Young said:³ "Of course the muddy state of the river may be so bad at certain times that the shipmaster instead of taking in the water from the river, should send elsewhere for it. Whether this mistake of taking water from the river amounts to an error of navigation in the sense of the charter-party⁴ is a question which has never been decided. I think it was a mistake to take water into the boiler in a muddy condition, and the evidence shews that this muddiness caused or contributed to the loss of the ship, but

¹ *Seville Sulphur and Copper Company v. Colvils*, 15 *Rettie* 616; *op. The Southgate* (1893), P. 329.

² 15 *Rettie* at 625.

³ *L. c.* at 626.

⁴ The charter-party freed the owners from liability from "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and errors or negligence, of navigation of whatsoever nature and kind, during the voyage."

I have a doubt as to whether it brought about what the sheriff-substitute calls unseaworthiness in a 'legal sense.' . . . That the presence of that muddy water in her boiler constituted unseaworthiness is a proposition by no means clear to my mind." The rest of the Court concurred with the Lord Justice-Clerk.

The deposit of mud in the boiler seems clearly a falling short of that condition of fitness in equipment that Parke, B., regarded as making up of seaworthiness; and to scour a boiler free from mud, at the point of departure on a voyage, would further appear to be a matter requiring that "great deal of time and trouble (time above all)," which Lord Blackburn marks as indicating a defect of seaworthiness rather than a mere temporary incommodity. If, then, *Seville Sulphur and Copper Company v. Colvils*^a gives an instance of a shortcoming that amounts to unseaworthiness, the defective fastening of the rail in *Hedley v. Pinkney*^b is an instance, on the other hand, of that negligence on the part of the crew which is not to be regarded as amounting to unseaworthiness of the ship.

What is seaworthiness "at the time of sailing" was considered by the Privy Council in *Biccard v. Shepherd*,^c where the voyage was divided into stages. Lord Wensleydale there laid down the rule by reference to his own judgment in *Dixon v. Sadler*^d as follows: "If the voyage be such as to require a different complement of men or state of equipment, in different parts of it, as if it was a voyage down a canal or river, and thence to and on the open sea, it is enough if the vessel be at each stage of the navigation in which the loss happens properly manned and equipped for it;" and the Court of Appeal in *Thin v. Richards*^e adopted this statement of the law.

Some difference of judicial opinion has existed as to the significance of a stipulation expressed to be "during the voyage, a phrase the meaning of which may be noted conveniently in the present connection, though it is not primarily applicable to seaworthiness." In *Crow v. Falk*^f the words were held to apply only to the time after the voyage began, and it was held that the voyage could not begin before the ship's loading was completed. In *Bruce*

¹ *Ante*, 1256.

² 15 *Rettie* 616; but see *Cunningham v. Colvils*, 16 *Rettie* 295, before the First Division of the Court of Session, where, however, Lord Adam said, at 309: "We were referred to the case of the *Seville Sulphur and Copper Company* against the present defenders" . . . "in which the Second Division arrived at a different conclusion from that at which I have arrived, but it is enough to say that the evidence we have had to consider is materially different from the evidence in that case."

³ (1892) 1 Q. B. 58, in H. of L. (1894) App. Cas. 222. For what is negligence of master or crew in the navigation of the ship in the ordinary course of the voyage under a charter-party, see *The Accomar*, 15 F. D. 208.

⁴ 14 Moo. P. C. C. 471.

⁵ 5 M. & W. 405, at 414.

⁶ 14 Moo. P. C. C. at 493.

⁷ (1892) 2 Q. B. 141.

⁸ 8 Q. B. 467.

v. Nicolopulo,¹ Pollock, C.B., dissented from this decision, and it was held in that case that a preliminary voyage was to be considered part of the voyage contemplated by the contract. Again, in *Barker v. M'Andrew*,² it was held that where a ship described as then at N., was to proceed at the usual place of loading at N., and there load and proceed to A., with the usual exceptions "during the said voyage" that the exceptions applied to the preliminary transit to the port of loading. In a similar sense was the decision of Sir James Hannen in *The Carron Park*,³ where the cases of *Bruce v. Nicolopulo* and *Barker v. M'Andrew* are considered "conclusive;" while in the succeeding case of *The Accomac*⁴ the words in a charter-party, "negligence" "in the navigation of the ship in the ordinary course of the voyage," were held not to cover negligence while going into dock to discharge cargo after arrival.

Goods must be stowed so as not to cause damage to other goods.

Besides providing a seaworthy vessel for the carriage of goods there is an obligation implied on the shipowner to place goods which are entrusted him to be conveyed, and which are likely to cause injury to other goods conveyed in the ship, in a position where they are not harmful to the rest of the cargo, even though the injurious goods are placed on board in a condition to do mischief, and by the shippers of the damaged goods.⁵ If the shipper of goods in a general ship sustains loss from damage done to his goods by other goods, he has an action against the shipowner without proof of negligence, though it is incumbent upon the shipper to see that his goods are of such a character and in such condition that they will bear the voyage upon which he sends them, if conducted in the usual and accustomed manner.⁶ The presumption is of course that he has done so; and the *onus* is therefore on the carrier to shew circumstances suggesting default.⁷

Damage to cargo no ground for refusal to pay freight.

The obligation to put goods in a suitable place,⁸ and to take requisite measures to preserve them⁹ at common law does not entitle

¹ 11 Ex. 129.

² 15 P. D. 203.

³ *Alston v. Herring*, 11 Ex. 822.

⁴ *Gillespie v. Thompson*, 6 E. & B. 477 n.; *The Bark Colonel Ledyard*, 1 Sprague (U. S. Adm.) 530.

⁵ In *Snow v. Carruth*, 1 Sprague (U. S. Adm.), at 327, Sprague J., said: "I am satisfied that the great loss in this case (above the necessary leakage) was partly attributable to the negligence of the carrier, and partly to the negligence or misfortune of the shipper or consignee, and that it is not practicable to ascertain for how much of the loss the one party, or the other, is, in fact, responsible. I am, therefore, obliged to adopt some arbitrary rule in determining the amount to be allowed the respondents. An analogy may be found in the rule adopted by Courts of Admiralty, in cases of collision where both parties are in fault."

⁶ *The Oquendo*, 38 L. T. (N. S.) 151; *Hayn v. Culliford*, 3 C. P. D. 410, 4 C. P. Div. 182.

⁷ *Notara v. Henderson*, L. R. 5 Q. B. 346, L. R. 7 Q. B. 225, at 235; *Tronson v. Dent*, 8 Moo. P. C. C. 419; *Australasian Steam Navigation Company v. Morse*, L. R. 4 P. C. 222; *De Cuadra v. Swann*, 16 C. B. N. S. 772. *Hingston v. Wendt*, 1

⁸ 34 L. J. C. P. 191.

⁹ 15 P. Div. 208.

the consignee to resist payment of freight on the ground that the goods were damaged, if he had not specially contracted for the right to do so. The negligence of the master in this respect is only a matter for a cross action.

The leading case for this proposition is *Dakin v. Oxley*,¹ where Willes, J., in a considered judgment, examines the law on the subject, and concludes that a plea which was bad which set up that through the fault of the shipowner goods shipped had become worthless, and were abandoned by the owner, who was thereby discharged from the payment of the freight. Willes, J., citing "Professor Parsons in his learned work upon Maritime Law, vol. i. p. 172," states the law in America to be, that "if the cargo arrives in specie, notwithstanding that it is damaged, whether fortuitously or culpably, so as to be worthless, the freight² is earned, although in case of culpable damage set off is allowed." The contrary is nevertheless held in *Snow v. Carruth*,³ in which the decision of Story, J., in *Willard v. Dorr*,⁴ is cited as an authority; and that decision has been followed in not a few cases.⁵

Though the common law on the point remains unaltered, its effect is neutralized by the provisions of the Judicature Acts, 1873, 1875, by which (and the rules made under them⁶) a defendant may set up a counter-claim to an action. A claim for freight may therefore be met by a counter-claim for damage to the cargo.⁷

If goods are furtively put on board a presumption may arise

Q. B. D. 367, affirms the existence of a lien on cargo preserved, though the charges were incurred without authority from the owner. This is on the analogy of general average or salvage.

¹ (1864) 15 C. B. N. S. 646, at 664.

² "The inception of freight," says Eyre, C.J., "is breaking ground": *Curling v. Long*, 1 B. & P. 634, at 636. On the other hand, see *Beawes, Lex Mercatoria* (6th ed.), vol. i. 189, with which the civil law is in accord, D. 14, 2. Demurrage ceases on the day of sailing (or readiness to sail, *Pringle v. Mollett*, 6 M. & W. 80), and if subsequently the ship is detained, the freighter is not liable: *Jamieson v. Laurie*, 6 Bro. P. C. 474.

³ 1 Sprague (U. S. Adm.) 324.

⁴ 3 Mason (U. S.) 161, at 171.

⁵ See the whole controversy summarized in *Parsons, Law of Merchant Shipping*, vol. i. 206, note 2, which is in fact a new edition of "the work on maritime law," cited by Willes, J. It is strange that though the *Law of Merchant Shipping* was not published till 1869, there is no notice of the decision of *Dakin v. Oxley*, though that case was reported in 1864, and the English cases are largely drawn upon in the note referred to.

⁶ See R. S. C. 1883, Order xix. r. 3.

⁷ The definition of "freight" is considered by Willes, J., in *Denoon v. Home and Colonial Insurance Company*, L. R. 7 C. P. 341, at 348. See also *Beawes, Lex Mercatoria* (6th ed.), vol. i. 187; *Kay, Law relating to Shipmasters and Seamen* (2nd ed.), §§ 268-297. Freight under a charter-party is not an incident to the ownership of the vessel, so that an underwriter on the ship cannot claim any part of the damages recovered from the owners of the wrong-doing vessel on account of loss of prospective freight: *The Sea Insurance Company v. Hadden*, 13 Q. B. D. 706. For the payment of freight, *Abbott, Merchant Ships* (13th ed.), 533-624; 3 Kent, Comm. 219-230 (12th ed.), with Mr. Holmes's note, 228. As to the procedure for enforcing shipowners' right to freight see secs. 492-501 of *Merchant Shipping Act 1894* (57 & 58 Vict. c. 60), and *Furness v. White* (1894), 1 Q. B. 483, reversed in H. of L. 11 Times L. R. 129.

that the owner wished to defraud the carrier. This would rebut the presumption of an implied contract,¹ though if freight were received by the carrier it would more probably operate as a waiver of the surreptitious dealing, and the carrier would thereupon be clothed with his normal responsibilities.

Pothier's view
as to goods
furtively put
in a vessel.

Pothier is of opinion that the master who finds goods in his vessel furtively put there is at liberty to put them ashore and charge the expense of unlading to the owner. If he does not find them till after he has sailed, he may discharge them at an intermediate port before the end of the voyage, leaving them in the hands of some solvent merchant and giving the owner notice; yet if the vessel is able, he ought to carry them to their destination.²

By the Code de Commerce the master may only discharge³ the goods at the point where they are laden; or if he prefers to carry them he may charge the highest freight paid for merchandise of the same quality.⁴

Time for
loading.

If the time of loading is not the subject of special contract, the implication of law is that each party is to use reasonable diligence⁵ in performing his part. Failure by either resulting in loss creates a right of action in the other party.⁶ Where the performance of the contract is prevented by a cause over which neither party has any control, as by a threatened bombardment of the port of loading or delivery, an action is not maintainable.⁷

Master's duty.

The master⁸ is the general agent of the owner for the purpose of the voyage; and for the exercise of that agency is entrusted with powers to be used at his discretion.⁹ The owners are moreover held liable¹⁰ if the master exercises a power which circum-

¹ The *Huntress*, *Daveis* (U. S. Adm.) 82, at 91.

² Pothier, *Traité de Contrat de la Charte-partie*, n. 10, 12.

³ Code de Commerce, Art. 292; Boulay-Paty, *Droit Maritime*, vol. ii. 373; Alauzet, *Commentaire* vol. iii. 191.

⁴ Valin, *Ordonnance de la Marine*, liv. 3, tit. 3, art. 7.

⁵ *Jackson v. Union Marine Insurance Company*, L. R. 10 C. P. 125; *Poussard v. Spiers*, 1 Q. B. D. 410, per Blackburn, J., at 414. If the delay, though caused by something for which neither party is responsible, is so great and long as to make it unreasonable to require the parties to go on with the adventure, each may treat it as determined: *Dahl v. Nelson*, 6 App. Cas. 38, at 53. Cp. however, *Hurst v. Osborne*, 18 C. B. 144, approved *French v. Newgass*, 3 C. P. D. 163. As to continuing warranty, *Tully v. Howling*, 2 Q. B. D. 182. *Ante*, 1010.

⁶ *Fowler v. Knoop*, 4 Q. B. D. 299.

⁷ *Ford v. Cotesworth*, L. R. 5 Q. B. 544 (Ex. Ch.); *Hick v. Rodocanachi* (1891), 2 Q. B. 626, in H. of L. *sub nom.* *Hick v. Raymond* (1893), App. Cas. 22.

⁸ *Reverendum honorem sumit quisquis magistri nomen acceperit*: Cleirac, *Jugemens d'Oleron*, c. 1. Beawes, *Lex Mercatoria* (6th ed.), 155-166, *Master of Ship*; Malynes *Lex Mercatoria*, c. xxii, *Of the Master of the Ship, his power, and duty of the Master to the Merchants*; Bell, *Comm.* (7th ed.) 554-557, *Of the Shipmaster or Captain*.

⁹ *Duty of master to load*, *Anglo-African Company v. Lamzed*, L. R. 1 C. P. 226.

¹⁰ *Notara v. Henderson*, L. R. 7 Q. B. 225; *Ewbank v. Nutting*, 7 C. B. 797. Under 24 Vict. c. 10, s. 10, and 17 & 18 Vict. c. 104, s. 191, it was held that the master had a maritime lien on the ship for disbursements: *The Mary Ann*, L. R. 1 A. & E. 8; *The Glentaner*, *Sw.* (Adm.) 415; and that he could maintain an action *in rem* for "disbursements" without previous payment in respect of such liabilities: *The Sara*,

stances might justify, so that did the circumstances in fact exist, the act would be within the general scope of his functions, although the facts do not warrant its exercise in the particular case; for instance, if he unnecessarily throw goods overboard in a panic or sell goods without justifying need.

The master is bound to take all reasonable care of goods entrusted to him, even though there are special conditions exonerating his owner from the consequences of his defaults; and where accidents have happened for which neither he nor his owners are liable, he is still bound to take all reasonable precautions to neutralize their effects and to save what of the cargo he can for its owners.¹

The master is bound to attest by his signature the date as well as the fact of the shipment of goods. He is not indeed bound to superintend in person the receipt and the stowage of them; yet if he is not personally cognisant of the fact and time of shipment, it is his personal duty to inform himself upon both those points by examining the mate's receipts or the log-book before he signs bills of lading for the goods; and he can only discharge himself by showing either that he was relieved of his duty or that he made an honest attempt to perform it and failed through no fault of his own.²

The powers of the master of a ship for the maintenance of discipline³ are very large—even to admitting a liberty of exercising “the power of administering wholesome personal correction,” but not extending to authorize “mere passionate violence.”⁴ In the Scotch case⁵ just cited the master of a ship was sued for striking the pursuer, and a defence that the blow was struck in making

12 P. Div. 158. This was overruled in *The Sara*, 14 App. Cas. 209, where the House of Lords held that 24 Vict. c. 10, did not give the master a lien on the ship for disbursements. The result of this decision was the passing of 52 & 53 Vict. c. 46. The old decisions were thereby again made applicable: *Morgan v. Castlegate Steamship Company*, *The Castlegate* (1893), App. Cas. 38. The enactments referred to in this note are now consolidated as s. 167 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60). *Post*, 1330, n.¹. The judgment of Story, J., in *Pope v. Nickerson*, 3 Story (U. S.) 473, discusses the liability of the owners and the powers of the master.

¹ *Notara v. Henderson*, L. R. 7 Q. B. 225; *Adam v. Morris*, 18 Rettie, 153. See *ante*, 1251; and *post*, 1263.

² *Stumore v. Breen*, 12 App. Cas. 698, at 702.

³ See as to these Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 220–238. There is a conflict between the English and Scotch Courts as to whether these statutory powers exclude other remedies; cp. *The Great Northern Steamship Fishing Company v. Edgehill*, 11 Q. B. D. 225, with *Sharp v. Rettie*, 11 Rettie 745, where the English case is considered and dissented from. The master's powers for the maintenance of discipline are considered, *Beawes, Lex Mercatoria* (6th ed.), vol. i. 172, where also the rights and duties of mariners are treated.

⁴ *Per Curiam, Reekie v. Norrie*, 5 Dunlop 368, at 369.

⁵ *Reekie v. Norrie*, 5 Dunlop 368. In *United States v. Colby* (1846), 1 Sprague (U. S. Adm.) 119, it was held that if the master of a ship at sea, in the exercise of a sound and honest judgment, believes danger to be imminent, and to require the use of a dangerous weapon to reduce to obedience a seaman in open mutiny with weapons in his hand, and threatening the lives of the officers, and the master should use such a weapon from honest motives, he would be justified.

head against a mutiny would, it seems, have been sustainable; had not the facts shewn a violence that caused "effusion of blood," so that in the circumstances the defence was held not to have been made out, and the defender on whom the *onus* of proving a justification lay, was held liable. Still it is manifest that even "effusion of blood" may be justified in extreme circumstances. The main point is that personal constraint is justifiable, although only up to and in accordance with necessity.¹

The master is bound to sail so soon as wind and tide permit—but not in tempestuous weather.² If the ship is under a charter-party which provides for sailing on a given day the time must be kept unless necessity prevents. The master must besides proceed to the port of delivery without delay, and must not deviate unless to save life.³ If the ship is so disabled as not to admit of repair the master may procure another vessel to carry the cargo and save the freight—or he may adopt other means of transportation if they are available. If the freighter will not consent to the new means of transportation the master is entitled to full freight.⁴ Whether it is the *duty* as well as the *right* of the master to procure another vessel if he can to forward the cargo was left open by Lord Denman, C.J., in *Shipton v. Thornton*,⁵ and in *The Bahia*,⁶ Dr. Lushington laid down, first, that the master is under no absolute obligation towards the owner of goods to forward them in the original vessel; secondly, that it has never been decided that the master in any case is bound to tranship.⁷ But it is the

Transhipping.

¹ In *Vallance v. Falle*, 13 Q. B. D. 109, it was held that an action will not lie against the master for refusing to give a seaman the certificate of discharge directed to be given under the sec. 172 of The Merchant Shipping Act, 1854; see *Merchant Shipping Act*, 1894 (57 & 58 Vict. c. 60), s. 128. The master may discharge seamen for just cause, and even put them ashore in a foreign country: *Merchant Shipping Act*, 1894 (57 & 58 Vict. c. 60), ss. 186–189; *The Exeter*, 2 C. Rob. (Adm.) 261, at 272. See the master's duty to the mariner, c. x. of A Collection of all Sea Laws, bound up with Malynes *Lex Mercatoria* (3rd ed.)

² Abbott, *Merchant Ships* (13th ed.), see secs. The Commencement of the Voyage, 396, and The Course of the Voyage, 405.

³ *Scaramanga v. Stamp*, 5 C. P. Div. 295. Delay to avoid imminent danger of capture is justifiable: *The San Roman*, L. R. 5 P. C. 301. As to deviation as a ground of avoiding a policy of insurance, 3 Kent, Comm. (13th ed.), 312 *et seqq.* Park, *Marine Insurances* (8th ed.), 619, 658; Marshall, *Marine Insurance* (4th ed.), 138–163.

⁴ Molloy, bk. 2, c. 4, s. 5. Valin (*Ordonnance de la Marine*, liv. 3, tit. iii., du Fret ou Nolis, art. 12) and Pothier (*Charte Partie*, n. 68) contend that the master is no further bound to procure another vessel, than by losing his freight for the entire voyage, if he omits to do it. But Emerigon (*Traité des Assurances* [ed. Boulay-Paty], vol. i. 425), considers them mistaken, and says that the master is guilty of a breach of duty if he refuses to procure another vessel and take on the cargo. See *Code de Commerce*, 296; Boulay-Paty, *Cours de Droit Commercial Maritime*, vol. ii. 400–405: *mais le nouveau Code de Commerce, comme nous venons de le voir, impose au capitaine l'obligation de louer un navire en pareil cas, &c.*

⁵ 9 A. & E. 314.

⁶ B. & L. 292, at 304, 305.

⁷ Referring to *The Hamburg*, B. & L. 253. In *Wilson v. Bank of Victoria*, L. R. 2 Q. B. 203, Blackburn, J., says, at 211: "Inasmuch as the master could, by the expenditure of a comparatively small sum on temporary repairs and coals, bring the ship and cargo safely home, it was his duty to do so; and though we do not decide a point which does not arise, we are not to be taken as deciding that his owners would not have been liable to the owner of the cargo if he had not taken this course." The point was,

opinion of Lord Tenterden¹ that if the master's "own ship can be repaired, he is not *bound* to send the cargo by another, but may detain it till the repairs are made, and even hypothecate it for the expense of them; that is, supposing it not to be of a perishable nature; if it be of such a nature, and there be not time or opportunity to consult the merchant, he ought either to tranship or sell it, according as the one or the other will be most beneficial to the merchant."

We have noted that during the voyage the master must use all reasonable exertion to preserve the cargo.² Pollock, C.B., expresses this duty in *Laurie v. Douglas*³ to be, that he is bound "to take the same care of the goods as a person would of his own goods, viz., ordinary and reasonable care." Lord Tenterden, on the other hand, says "the master must during the voyage take all possible care of the cargo."⁴ The apparent difference of these views may be harmonized by considering the care a person would take of his own cargo to be the very greatest.⁵

Degree of care required in dealing with cargo.

On the arrival of the ship the cargo is to be delivered to the consignee or to the order of the shipper on production of the bill of lading and payment of the freight; and the master has no right to detain the goods for wharfage if the consignee tenders the freight and requires them to be delivered over the ship's side.⁶

Cargo to be delivered over to the consignee.

The master may even sell the ship for the benefit of the owners,⁶ in a case of extreme necessity; for instance, where a ship has got aground and in the opinion of competent judges cannot be raised.⁷

Power of master to sell ship in a case of extreme necessity.

The master is personally liable for all acts of negligence or misfeasance of his crew causing injury to cargo or property.⁸ He is however, decided in *The Assicurazioni Generali and Schenker & Company v. SS. Bessie Morris Company, Limited* (1892), 2 Q. B. 652, a case of a charter-party.

Personal liability of master.

¹ Abbott, *Merchant Ships* (5th ed.), 240; (13th ed.), 411.

² *Ante*, 1261. *Notara v. Henderson*, L. R. 7 C. P. 225, at 232.

³ 15 M. & W. 746, at 749, approved by the Court at 754.

⁴ *Merchant Ships* (13th ed.), 430. For this he cites Emerigon, *Traité des Assurances* (ed. Boulay-Paty), 372: *Le capitaine est un mandataire à gage qui répond de la faute très légère*. Cp. 3 Kent, Comm. 213 n. (c); Story, *Bailm.* § 509 *et seqq.* As to carriage of grain, *Merchant Shipping Act, 1894* (57 & 58 Vict. c. 60), ss. 452-456, and sch. xviii.

⁵ *Ante*, 35, and 911.

⁶ Abbott, *Merchant Ships* (13th ed.), 445, *The Completion of the Voyage*.

⁷ *Hayman v. Molton*, 5 Esp. (N. P.) 65. The *onus probandi* undoubtedly lies on the purchaser from the master to shew the necessity: *The Australia*, in the Privy Council, Swa. (Adm.), 480, at 484. As to the master's authority to sell, and what constitutes "necessity," see *Australasian, &c. Company v. Morse*, L. R. 4 P. C. 222; *Acatos v. Burns*, 3 Ex. Div. 282; *Atlantic Mutual Insurance Company v. Huth*, 16 Ch. Div. 474; and see the note to *The Gratitude*, Tudor, L. C. on *Mercantile Law* (3rd ed.), at 84.

⁸ Molloy, bk. 2. c. 3, s. 13. The reason given by Molloy is "for that the mariners are of his own choosing, and under his correction and government, and know no other superior on shipboard but himself; and if they are faulty he may correct and punish them and justify the same by law; and likewise, if the fact is apparently proved against them, may reimburse himself out of their wages." Thus, an infant has been held liable in Admiralty: *Roll. Abr. Court de Admiraltie*, (C) *Admirall Iley*, pl. 3; and an owner has been convicted under 54 Geo. III. c. 159, s. 11, of the offence of throwing ballast into navigable rivers, where not even on board: *Michell v. Brown*, 1 E. & E. 267. In *The Queen v. Judge of City of London Court* (1892), 1 Q. B. at 295,

not liable for their wilful torts nor for acts beyond the scope of their employment causing injury to other vessels.¹

The captain of a Queen's ship is, as we have seen, not liable for acts that he has not directly been concerned in.²

By the Merchant Shipping Act, 1894,³ s. 59 (1), the name and address of the managing owner of every British ship is to be registered at the port of the ship's registry. The object of this is "to insure the safety of people who go on board ship—to insure that the ship should be safe; and it puts certain liabilities for that purpose on the person who is the ship's manager, and prevents his saying when those liabilities arise that he is not managing owner."⁴ There is no definition in the Act of the term "managing owner."⁵ As to his position Lord Esher, M.R., in the case just cited, adopts the language of Bowen, J., in *Frazer v. Cuthbertson*.⁶ "The 36th

Captain of
Queen's ship
not liable.
Managing
owner.

Lord Esher,
M.R., in
Baumwoll
Manufactur
von Scheibler
v. Gilchrest.

Lord Esher, M.R., says: "I think it cannot be denied that the Admiralty Court has exercised jurisdiction over the master with regard to certain complaints; but, whether the Admiralty Court can exercise, or ever has exercised, jurisdiction over the master in respect of a collision, so as to make him liable to the full extent of the damage, I will not decide on the present occasion, though the strong inclination of my opinion is, that the Court of Admiralty has never exercised such a jurisdiction against the master." The position of a master of a ship, with his powers and duties, is exhaustively dealt with, *Vin. Abr.*, Master of a Ship, and from the point of view of American law, in *Parsons, Law of Shipping*, vol. ii. 1-32.

¹ *Bowcher v. Noidstrom*, 1 Taunt. 568. See *The Druid*, 1 W. Rob. (Adm.) 391, and the cases there cited. No action will lie at the suit of a sailor on the promise of the captain to pay extra wages in consideration of his doing an extra share of work: *Harris v. Watson*, Peake (N. P.) 72; followed in *Stilk v. Myrick*, 2 Camp. 317; and distinguished, *Hartley v. Ponsonby*, 7 E. & B. 872. The master has a lien on the goods and on the freight to the extent of his engagement: *White v. Baring*, 4 Esp. (N. P.) 22. The legal position of the master of a vessel disabled from carrying on the cargo, at an intermediate port, is stated by Cockburn, C.J., in *Metcalf v. Britannia Ironworks Company*, 1 Q. B. D. 613, at 625, 2 Q. B. Div. 423, following Lord Stowell in *The Gratitudine*, 3 C. Rob. (Adm.) 240.

² *Nicholson v. Mouncey*, 15 East 384. *Ante*, 287.

³ 57 & 58 Vict. c. 60.

⁴ Per Lord Esher, M.R., in *Baumwoll Manufactur von Scheibler v. Gilchrest* (1892), 1 Q. B. 253, at 260, referring to the incorporated Act, 39 & 40 Vict. c. 80, s. 36. As to the duty of "managing owner," *Williamson v. Hine Brothers*, (1891) 1 Ch. 390; *The Mount Vernon*, 64 L. T. 148. As to his authority, *The Huntsman* (1894), P. 214; and *Steele v. Dixon*, 3 Rettie 1003, dealing with the authority of the managing owner without specific authority, when a vessel is in a home port and the owners easily accessible, to bind them for the cost of extensive structural alterations. The policy of the Registry Acts is discussed by Lord Eldon, *Ex parte Yallop*, 15 Ves. 60. The modern Acts are discussed, *Chasteauneuf v. Capeyron*, 7 App. Cas. 127. As to registered owners, see Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 11; *Hibbs v. Ross*, L. R. 1 Q. B. 534; *Abbott, Merchant Ships* (13th ed.) 83-113. For the history of Shipping Legislation, see *Pulling Shipping Code*, Introduction x.

⁵ As to this, see *Abbott, Merchant Ships* (13th ed.), 100-111. The ship's husband or managing owner is an agent appointed by the owners to do what is necessary to enable the ship to prosecute her voyage and to earn freight. He may be either a part owner or a stranger, and empowered to act on the return of the ship to port, or having a more general agency. His duty is generally to see to the proper outfit of the vessel, but he has no authority to insure or borrow money for the owners, or to bind them to the expenses of lawsuits: *French v. Backhouse*, 5 Burr. 2727; *Sims v. Brittain*, 4 B. & Ad. 375; *Coulthurst v. Sweet*, L. R. 1 C. P. 649; nor to bind them by an agreement to cancel the charter-party and to pay the charterers a sum in lieu of commission, although such agreement is for the benefit of the owners: *Thomas v. Lewis*, 4 Ex. D. 18. See also *Barker v. Highley*, 15 C. B. (N. S.) 27.

⁶ 6 Q. B. D. 93, at 99; *Miles v. McIlwraith*, 8 App. Cas. 120.

section of the Act¹ nowhere creates new agents, new functions, new capacities, nor clothes existing agents with enlarged powers. The section is part of the machinery designed to secure adequate protection for lives and property at sea. . . . A managing owner registered under the Act is no more and no less than a managing owner before the Act. He binds those whose agent he is, he binds nobody besides." Consequently where the registered managing owner divested himself by a charter-party of all control and possession of a vessel for the time being, he was held not liable for the alleged negligence of the captain in taking the vessel to sea in an unseaworthy condition, though he was registered as managing owner.² And in the House of Lords Lord Herschell, C., said:³ "I cannot think that this legislation altered in any way the liabilities or the rights of a person who was registered as the managing owner, or who in fact was the managing owner, except so far as the legislature created new liabilities. It did, no doubt, create them, because it rendered the person registered as managing owner liable to penal consequences in case of the unseaworthiness of the vessel and his inability to prove that he had taken proper precautions. . . . But beyond that it seems to me that it would be improper to impose any liability which the Legislature has not by enactment clearly shewn its intention to impose."

Opinion of
Lord Her-
schell, C.

As the master is liable for the tortious acts of the crew, so the owners are liable for the tortious acts of the master,⁴ even where the vessel is sailing under a charter-party, and is under the direction of an agent of the charterers—if, that is, the master is appointed by the owners.⁵ This liability is, of course, subject to

Owners liable
for tortious
acts of master.

¹ 39 & 40 Vict. c. 80, repealed by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), sch. xxii.

² *Baumwoll Manufactur von Scheibler v. Gilchrest* (1892), 1 Q. B. 253 in H. of L. (1893) App. Cas. 8. As to the inability of sailors to refuse to act in circumstances of danger: *Rothwell v. Hutchinson*, 13 Rettie 463, a decision on 39 & 40 Vict. c. 80, s. 5, repealed by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 745, sch. xxii.; but re-enacted by sec. 458. For the limits of "compensation for loss or damage sustained by reason of detention" under sec. 10 of the former Act, now s. 460 of 57 & 58 Vict. c. 60, see *Dixon v. Calcraft* (1892), 1 Q. B. 458.

³ (1893) App. Cas. 8, at 20.

⁴ *The Excelsior*, L. R. 2 A. & E. 268; *Davis v. Garrett*, 6 Bing. 716; *Scaramanga v. Stamp*, 5 C. P. Div. 295; *Newall v. Royal Exchange Steamship Company*, 33 W. R. 342, 868; *Malpica v. McKown*, 1 La. Rep. 248; *Arayo v. Currel*, 1 La. Rep. 528. *O'Neil v. Rankin*, 11 Macph. 538, is an exception to this liability, where the master acts under the powers conferred by s. 246 of 17 & 18 Vict. c. 104, re-enacted by s. 223 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60).

⁵ *Fletcher v. Braddick*, 2 B. & P. (N. R.) 182; *Fenton v. Dublin Steam Packet Company*, 8 A. & E. 835. Whether the owner or the charterer is liable for injuries caused by the negligence or unskilful management of the vessel is to be determined by the terms of the instrument of charter as explained by the circumstances of each individual case: *Schuster v. McKellar*, 7 E. & B. 704; 3 Kent, Comm. (13th ed.), 133-138. See *post*, 1285. *Whitewood v. Andersen*, 11 Times L. R. 47, is the case of an unsuccessful attempt by a stevedore's labourer to charge shipbrokers and agents with liability for personal injuries received while engaged in unloading a cargo.

the usual limitations; the act for which the owners are sought to be charged must be neither wilful nor outside the scope of authority.¹

Where injury is done by the negligent or unskilful management of a ship, the possession and control of which has so completely passed to the charterer that he has appointed the master and crew, and directed the mode of her navigation, then he and not the owner is responsible.²

Owners liable
for pilot.

At common law, too, the owners are liable for all the tortious or negligent acts of the pilot under the same limitations as we have just expressed.³ The master, being an intermediary, would not be liable.⁴

Owner's li-
ability for
necessaries.

The owner is personally liable for necessities⁵ furnished or repairs made to a ship by order of the master; if, that is, the supplies furnished are reasonably fit and proper for the occasion.⁶ The test applied is to ascertain whether a prudent owner, had he been himself present, would have ordered them. The *onus* of proof is on the plaintiff.⁷ If the owner has not the control and management of the vessel, or the right to receive her freight and earnings, he is not responsible.

Who is
owner.

By owner is not necessarily meant registered owner; in most

¹ The *Druid*, 1 W. Rob. (Adm.) 391. "No suit," says Dr. Lushington, "could ever be maintained against a ship where the owners were not themselves personally liable, or where their personal liability had not been given up, as in bottomry bonds, by taking a lien on the vessel." See this passage cited and explained by Sir J. Hannen, *The Tasmania*, 13 P. D. 110, at 115. Cp. *The Ida*, Lush. 6; *The Princess Royal*, L. R. 3 A. & E. 41; *The Waldo*, (Davis U. S. Adm.) 164. Cp. *Ewbank v. Nutting*, 7 C. B. 797; *Schuster v. McKellar*, 7 E. & B. 704. See *post*, 1330.

² *Scott v. Scott*, 2 Stark. (N. P.) 438.

³ *Cp. Bussey v. Donaldson*, 4 Dallas (Pa.) 206. *Post*, 1269.

⁴ *Aldrich v. Simmons*, 1 Stark. (N. P.) 214; *Bowcher v. Noidstrom*, 1 Taunt. 568. In 3 Kent, Comm. 176, there is an instructive note on the subject of pilotage, its duties and responsibilities.

⁵ *Cary v. White* (1710), 5 Bro. Parl. Cas. 325. Sir Wm. Scott, in *The Gratitude*, 3 C. Rob. (Adm.) 240, at 274, doubts whether the master has authority, even in a case of uttermost distress and in a foreign port, to bind the owners beyond the value of the ship and freight; yet after considerable discussion he admits the master's power to hypothecate cargo in a foreign port; and it is said in *Abbott, Merchant Ships* (13th ed.), 160: "It has been always held that the master, if he cannot otherwise obtain money, may sell a part of his cargo to enable him to convey the residue to the destined port." The owner's personal liability seems now undoubted: *Arthur v. Barton*, 6 M. & W. 133; *Gunn v. Roberts*, L. R. 9 C. P. 331. As to Brett, J.'s comment on Dr. Lushington's *dictum* in *The Faithful*, 31 L. J. (P. M. A.) 81, see the point discussed and the authorities cited in *Abbott, Merchant Ships* (13th ed.), 139, *et seqq.*, where the correctness of Dr. Lushington's *dictum* is maintained. The owners are never personally responsible where a bottomry bond is given: *Abbott, Merchant Ships* (13th ed.), 157. As to bottomry bonds, see *The Karnak*, L. R. 2 A. & E. 289; *Kleinwort, Cohen & Company v. The Cassa Marittima of Genoa*, 2 App. Cas. 156, and especially the note to *The Gratitude*, Tudor, L. C. on Mercantile Law (3rd ed.), at 59-83. The lender is bound to exercise a reasonable diligence to see that the supplies are at least apparently necessary. He must act with good faith. A regular survey is *prima facie* evidence of the necessity of repairs so as to justify the master as well as the lender. The presumption is in their favour; the *onus probandi* of the contrary lies on the owner who resists the bottomry bond: 3 Kent, Comm. 170, n. (a), 354-363.

⁶ *Abbott, Merchant Ships* (13th ed.), 131 *et seqq.*

⁷ *Webster v. Seekamp*, 4 B. & Ald. 352; *Mackintosh v. Mitcheson*, 4 Ex. 175.

cases ownership signifies legal ownership, and the question is "upon whose credit was the work done."¹ The fact of a person's name appearing on the register as owner is, unexplained, some evidence of liability for work done or orders given within the scope of a master's general authority, although the question is not concluded thereby, and is whether owner or charterer, or intended purchaser by authority of whom the master gave the order, is liable upon them.²

In the absence of the master the mate succeeds to the master's The mate. authority, without, however, losing his character and privileges as mate; as Lord Stowell says:³ "The mate is *hæres necessarius* to the employment of master in case of necessity." But since by the Merchant Shipping Act, 1894, s. 167, the master is given the same remedy for wages as seamen have, the position of the mate in command does not seem to differ from that of the master.⁴

The charterer is bound to use the ship in a lawful manner, The charterer. and only for the purposes for which it is let. The command of the ship is most commonly reserved to the owner,⁵ and to his master; and the charterer has no power to detain the ship beyond the stipulated time or to employ her in services other than those contracted for; and if prohibited or contraband goods are put on board by him, or those acting under him, he will be answerable for the consequences of doing so.⁶

We shall presently note the statutory provision with regard to Pilotage. compulsory pilotage. Independently of that the English courts have uniformly held that where a pilot⁷ is employed under statutory sanction the owners and master are not liable for injuries arising from his acts.⁸

¹ Per Lord Tenterden, *Jennings v. Griffiths*, Ry. & M. 42, at 43; *Reeve v. Davis*, 1 A. & E. 312; *The Great Eastern*, L. R. 2 A. & E. 88.

² *Mitcheson v. Oliver*, 5 E. & B. 419. For liability of trading owners, *The Vindobala*, 13 P. D. 42.

³ *The Favourite*, 2 C. Rob. (Adm.), 232, at 237. See *The Segredo*, 1 Ecc. & Ad. (Spinks), 36, at 39; *The Cynthia*, 16 Jur. 748; *The Tecumseh*, 3 W. Rob. (Adm.) 144; *Hanson v. Royden*, L. R. 3 C. P. 47.

⁴ 57 & 58 Vict. c. 60. In *The Exeter*, 2 C. Rob. (Adm.) 261, the position of the mate is considered. It would require a case of flagrant disobedience, negligence, or palpable want of skill to authorize the captain to displace a mate: 3 Kent, Comm. 183. As to the position of seamen sick and disabled on the voyage, *Harden v. Gordon*, 2 Mason (U. S.) 541; *Reed v. Caulfield*, 1 Sumn. (U. S. Circ. Ct.) 195.

⁵ *The Omoo Coal and Iron Company v. Huntley*, 2 Q. B. D. 464.

⁶ *Lewin v. East India Company*, Peake (N. P.) 241; *Brass v. Maitland*, 6 E. & B. 470; *Pierce v. Winsor*, 2 Sprague (U. S. Adm.) 35.

⁷ *Abbott, Merchant Ships* (13th ed.), Of Pilots, 189-205; *Kay, Shipmasters and Seamen* (2nd ed.), §§ 550-555. See also *Beawes, Lex Mercatoria* (6th ed.), vol. i. 203-236, for a great collection of information relative to pilots.

⁸ *Carruthers v. Sydebotham*, 4 M. & S. 77; *Bennet v. Moita*, 7 Taunt. 258; *The Maria*, 1 W. Rob. (Adm.) 95, at 107; *The Annapolis*, Lush. 295; *The Hibernian*, L. R. 4 P. C. 511; *The Princeton*, 3 P. D. 90. Where pilotage is not compulsory the employment of a pilot does not relieve a shipowner of his responsibility: *The Sutherland*, 12 P. D. 154; *Courtney v. Cole*, 19 Q. B. D. 447. In *Arnould, Marine Insurance* (4th ed.), 598, the opinion is expressed that except where required to take a compulsory

Law in the
United States
as to shipper's
lien on ship.

In the United States the ship has been held liable though the employment of the pilot is compulsory.¹ In another respect, too, the law of the United States merits notice. There it has been decided² that a merchant who ships merchandise in a vessel on freight has a lien on the vessel for the loss of his goods or any damage they may sustain from the fault or neglect of the master or the insufficiency of the vessel. We are also told by the same high authority that this was always the rule even under the Admiralty law of England, where, however, it "ceased to be of any practical use for the want of an appropriate process to enforce the lien," that is, the common law courts of the country interposed all the difficulties they could in the way of the exercise of the Admiralty jurisdiction. The rule in the United States is expressed to be that the ship is bound to the merchandise in the same manner as the merchandise is bound to the ship.

To obviate a grievance suffered by consignees through short delivery of goods brought to England in foreign ships against the owners of which, as they were resident abroad, the common law courts could afford no adequate remedy, it was provided by the Admiralty Court Act 1861³ that the High Court of Admiralty should have jurisdiction over "any claim by the owner, or consignee, or assignee, of any bill of lading of any goods carried into any port of England or Wales, in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of, or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shewn to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales."⁴

Certain statutory limitations to liability must be here noticed.

Provisions of
the Merchant
Shipping Act,
1854.

By the Merchant Shipping Act, 1894,⁵ s. 502, "The owner

pilot by Act of Parliament, the captain's negligence in not having a pilot on board, whereby a loss accrues, will not discharge underwriters from their liability if the loss be proximately caused by perils insured against.

¹ *The China*, 7 Wall. (U. S.) 53; 3 Kent, Comm. 176, where the duty to employ a pilot is minutely considered. Story, Agency, § 456 a; Parsons, Law of Shipping, vol. ii. 106-119.

² *The Rebecca*, Ware (U. S. Dist. Ct.) 188.

³ 24 Vict. c. 10.

⁴ *The St. Cloud*, B. & L. 4, at 14. Dr. Lushington's view as to the limitations of this section was dissented from in *The Nepoter*, L. R. 2 A. & E. 375. The soundness of the view there taken is recognized by Lord Blackburn in *Sewell v. Burdick*, 10 App. Cas. 74. On the other hand an expression in the judgment of the Court of Common Pleas, delivered by Brett, J., in the case of *Simpson v. Blues*, L. R. 7 C. P. at 297, supports Dr. Lushington's view; citing which case in *The Rona*, 7 P. D. 247, Sir Robert Phillimore says of the decision therein: "it was admitted (it) could now not be relied on." See *Cargo ex Argos*, L. R. 5 P. C. 134, approved in *The Alina*, 5 Ex. D. 222. But see per Lord Esher, M.R., *The Queen v. Judge of the City of London Court* (1892), 1 Q. B. 273, at 290.

⁵ 57 & 58 Vict. c. 60.

of a British sea-going ship,¹ or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity,² in the following cases:

- (1) Where any goods, merchandise, or other things whatsoever taken in or put on board ship³ are lost or damaged by reason of fire⁴ on board the ship;
- (2) Where any gold, silver, diamonds, watches, jewels, or precious stones, taken in or put on board his ship, the true nature and value of which have not at the time of shipment been declared⁵ by the owner or shipper thereof to the owner or master of the ship in the bills of lading or otherwise in writing, are lost or damaged by reason of any robbery, embezzlement, making away with or secreting thereof."

By section 508, "Nothing in this part of this Act shall be construed to lessen or take away any liability to which any master or seaman, being also owner or part owner of the ship to which he belongs, is subject in his capacity of master or seaman,⁶ or to extend to any British ship which is recognized as a British ship within the meaning of this Act."

The limitation of liability section of the Merchant Shipping Act, 1894,⁷ is considered subsequently under Collisions on Water.⁸

Another statutory limitation to the liability of the shipowner is ^{Compulsory pilotage.} where the ship, at the time of the damage done to goods, is in charge of a pilot whom he is compelled to employ. In considering the position of a ship in relation to compulsory pilotage it must be borne in mind that compulsory pilotage is not a charge upon vessels, but rather a regulation for their benefit.¹⁰

By the Merchant Shipping Act, 1894,¹¹ s. 633. An owner or master of a ship shall not be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of that ship within any district where Not qualified

¹ For definition see section 742. *Ex parte* Ferguson and Hutchinson, L. R. 6 Q. B. 280; *The C. S. Butler*, L. R. 4 A. & E. 238; *The Mac*, 7 P. D. 126, decided on the corresponding s. (503) of the Act of 1854.

² *The Obey*, L. R. 1 A. & E. 102.

³ Ship is defined 57 & 58 Vict. c. 60, s. 742.

⁴ *Morewood v. Pollok*, 1 E. & B. 743; *Schmidt v. The Royal Mail Steamship Company*, 45 L. J. Q. B. 646; *Crooks v. Allan*, 5 Q. B. D. 38. The scope of limitation actions is discussed in *The Karo*, 13 P. D. 24; cp. *Constable v. National Steamship Company*, 154 U. S. (47 Davis) 51, at 62.

⁵ *Williams v. The African Steamship Company*, 26 L. J. Ex. 69, is a decision on the similar words of the previous Act. Cp. *Gibbs v. Potter*, 10 M. & W. 70.

⁶ *The Cricket*, 5 Mar. Law Cas. (N. S.). 53.

⁷ See ss. 1, 2, and 3.

⁸ 57 & 58 Vict. c. 60, s. 503.

⁹ *Post*, 1344.

¹⁰ *The Hanna*, L. R. 1 A. & E. 283.

¹¹ 57 & 58 Vict. c. 60.

the employment of a qualified pilot is compulsory by law.¹ The protection of the section is given only where the shipowner or the master is free from blame; for the presence of the pilot is not the exoneration of the crew. The proposition ought rather to be stated—the intervention of the pilot is not the augmentation of the responsibilities of the owner or the master.² The pilot is on the ship to take charge of the steering, and when the pilot is proved to have given orders, which were obeyed, from which damage has arisen, a *prima facie* case of negligence is made against him, though not against the owners. Yet if the proof is no more than that the pilot gave the orders without their being obeyed, *prima facie* negligence is not made out, nor the owners exonerated.³ If it be proved that a qualified pilot was acting in charge of a ship; secondly, that the charge was compulsory; thirdly, that the damage happened through the pilot's fault;⁴ it lies upon the plaintiff to shew that other causes existed for which the owner is responsible. Having done this, the *onus* is upon the defendant to

¹ This is a question the solution of which now depends on the Merchant Shipping Act, 1894, or on the local statutes governing in the place where the act was done or negligence permitted, from which the proceedings arise. For a collection of cases, see Carver, Carriage of Goods by Sea (2nd ed.), 30–33; Abbott, Merchant Ships (13th ed.), 197–205; Kay, Merchant Ships and Seamen (2nd ed.), 562–584; see the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), Part x, ss. 572–633. It is only necessary that the vessel should still be in charge of a pilot who has been compulsorily taken on board, even although the ship at the time of the matter forming the cause of action arising, was outside the district of compulsion. General Steam Navigation Company v. British and Colonial Steam Navigation Company, L. R. 3 Ex. 330, 4 Ex. 238; The Guy Mannering, 7 P. D. 132. In The Stettin, B. & L. 199, the pilot was taken on board where there was no compulsion, i.e., by a passenger ship when no passengers were on board (see sec. 625 of 57 & 58 Vict. c. 60), and therefore the rule did not there apply; The Lion, L. R. 2 P. C. 525; The Hankow, 4 P. D. 197. See The Earl of Auckland, Lush. 164, 387; Carruthers v. Sydebotham, 4 M. & S. 77; Attorney-General v. Case, 3 Price (Ex.) 302; The City of Cambridge, L. R. 5 P. C. 45. Cp. under 6 Geo. IV. c. 125, s. 55: Lucey v. Ingram, 6 M. & W. 302 (as to which see The Lion, L. R. 2 P. C. 525); Beilby v. Scott, 7 M. & W. 93; Beilby v. Shepherd, 3 Ex. 40; The Fama, 2 W. Rob. (Adm.) 184. Sec. 603 of 57 & 58 Vict. c. 60 preserves all the exemptions that existed at the date of the coming into operation of the Act, e.g., under 6 Geo. IV. c. 125, s. 59. The Vesta, 7 P. D. 240. As to the liability of harbour trustees appointed “pilotage authority” by virtue of a local Act for employing “hobblers,” instead of appointing pilots, see Holman v. Irving Harbour Trustees, 4 Rettie 406. As to who is a qualified pilot duly licensed within the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 586, The Carl XV. (1892), P. 132, C. A. 324. See McCulloch, Comm. Dict. Pilots.

² Clyde Navigation Company v. Barclay, 1 App. Cas. 790, explained as to *onus* of proof, The Indus, 12 P. D. 46. The “person in charge” under 25 & 26 Vict. c. 63, s. 33, is the ship's master. Subsequent misconduct of the master in not rendering assistance in the case of a collision caused by the neglect of a compulsory pilot, will not render owners liable: The Queen, L. R. 2 A. & E. 354. This section is re-enacted 36 & 37 Vict. c. 85, s. 16, and incorporated in the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 422. As to “fault or privity” of master under 25 & 26 Vict. c. 63, s. 54, now incorporated in the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 503, see The Ober, L. R. 1 A. & E. 102; The Empusa, 5 P. D. 6.

³ The Indus, 12 P. D. 46.

⁴ It must be exclusively his fault, even though proof is given that he gave the orders and they were obeyed: The Iona, L. R. 1 P. C. 426; applied in The Minna, L. R. 2 A. & E. 97, and The Calabar, L. R. 2 P. C. 238; The Velasquez, L. R. 1 P. C. 494, 4 Moo. P. C. C. N. S. 426.

explain the circumstances so alleged, and to shew that the *prima facie* conclusion from them is not correct.¹

Previously to the decision in *Clyde Navigation Company v. Barclay*,² which established this procedure, some misapprehension existed as to the relations between the master and crew and the pilot. This arose from an inaccuracy of expression in the judgment of Dr. Lushington in *The Diana*.³ Speaking of the immunity of the shipowners, under the compulsory pilotage clauses of the Pilot Act, 1836,⁴ from liability for the negligence of the pilot, the learned judge there said: "That the exception under the Act ought to be construed strictly; and that if the accident was occasioned by the joint misconduct of the pilot and crew, I am bound to hold that the liability still attaches to the owners." This appears substantially accurate; but the expression left open the construction that not only must the defendant shew compulsory pilotage and negligence of the pilot, but also must negative any negligence on the part of the master and crew. And this construction, after being favourably regarded for some time, was definitely enunciated in the judgment of the Privy Council in *The Iona*.⁵ *The Iona* as follows: "It is not enough for them" (the owners) "to prove that there was fault or negligence in the pilot; they must prove, to the satisfaction of the Court, which has to try the question, that there was no default whatever on the part of the officers and crew of their vessel, or any of them, which might have been in any degree conducive to the damage."

In *Clyde Navigation Company v. Barclay*,⁶ commenting on this passage Lord Chelmsford said: "The learned Vice-Chancellor"—the judgment in the Privy Council case was delivered by Sir Richard Kindersley—"imposes upon the owners a species of negative proof which it is impossible for them to give. If instead of saying 'they must prove,' &c., he had said, 'it must be proved that there was no fault on the part of the officers and crew,' he would have been perfectly correct. . . . The owners, having proved fault on the part of the pilot sufficient to cause, and in fact causing, the calamity, must therefore, in absence of proof of contributory fault of the crew, be held to have satisfied the condition on which exemption depends, and are

¹ Per Lord Selborne, *Clyde Navigation Company v. Barclay*, 1 App. Cas. 790, at 796. As to the circumstances in which the master may be called on to interfere with the pilot, *The Lochlibo*, 3 W. Rob. (Adm.) 310, per Dr. Lushington, at 321; approved *Wood v. Smith*, *The City of Cambridge*, L. R. 5 P. C. 451; *The Oakfield*, 11 P. D. 34.

² 1 App. Cas. 790.

³ 1 W. Rob. (Adm.) 131, at 135, 4 Moo. P. C. C. 11.

⁴ 6 Geo. IV. c. 125, s. 55; see per Lord Lushington, *The Earl of Auckland*, Lush. 164, at 177, and now the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 598 (2).

⁵ L. R. 1 P. C. 426, at 432, referring with approbation to *The Christiana*, 7 Moo. P. C. C. 160, and to *The Schwalbe*, 14 Moo. P. C. C. 250.

⁶ 1 App. Cas. 790, at 792.

Lord
Selborne's
statement of
the law.

not to be called on to adduce proof of a negative character, to exclude the mere possibility of contributory fault. It may be that in the course of the evidence of the owners to fix the responsibility solely upon the pilot, certain acts or omissions on the part of the crew may come out; and it will then be incumbent on the owners to shew satisfactorily that those acts or omissions in no degree contributed to the accident." Lord Selborne,¹ adapting the expression of the Lord Justice Clerk,² states the law thus: "It is not enough for the owners to shew that the damage arose through the fault of the pilot, if there is reasonable ground³ for saying there was contributory fault on the part of the master or crew," and goes on to say: "The proof of circumstances which *prima facie* shew such reasonable ground for saying that there was contributory fault on the part of the master or crew, no doubt would throw upon the defender the burden of explaining those circumstances, so as to satisfy the Court that in point of fact the *prima facie* conclusion from those circumstances is not correct. If he fails to do that he fails altogether."⁴

Pilot personally
liable.

The pilot is personally liable for his own negligence.⁵ There is, moreover, a duty, to the pilot from the master, of *uberrima fides* to disclose all particulars affecting the efficiency of the ship, failing which the master is liable.⁶

Towage.

The case of towage involves some complications. A steam tug, it is said in a well-known United States case,⁷ which engages to

¹ L. c. at 797.

² 2 Rettie 843, at 845.

³ Lord Selborne substitutes the phrase "reasonable ground" for the Lord Justice Clerk's expression of "reasonable room"; for the rest the quotation follows the Lord Justice Clerk's words.

⁴ *Ante*, 164. As to the scope of the pilot's authority, see *Burrell v. MacBrayne*, 18 Rettie 1048. It extends to determining the proper time of the ship leaving her moorings and to the deciding on all precautions advisable for prudent navigation, per Lord Kinnear, 1057.

⁵ *The Queen v. Judge of City of London Court* (1892), 1 Q. B. 273. In *The Octavia Stella*, 57 L. T. 632, a pilot was held liable for anchoring a ship in an oyster bed. The same case considers the liabilities of the ship's master. In *Stone v. Cartwright*, 6 T. R. 411, Lord Kenyon, C.J., says: "The action must either be brought against the hand committing the injury, or against the owner for whom the act was done." *Post*, 1308. As to the duties of a pilot, see *The Guy Mannering*, 7 P. D. 132, at 134; *The Calabar*, L. R. 2 P. C. 238; for his duties generally, see *The Iona*, L. R. 1 P. C. 426; for his duties when the ship is at anchor, *The City of Cambridge*, L. R. 5 P. C. 451; as to the distinction between salvage and pilotage, *Akerbloom v. Price*, 7 Q. B. D. 129. Salvage is the service which those who recover property from loss or danger at sea, render to the owners, with the responsibility of making restitution and with a lien for their reward: per Lord Stowell, *The Thetis*, 3 Hagg. (Adm.) 48. Salvage is a reward for services actually conferred and not for services attempted to be rendered: *The Chetah*, L. R. 2 P. C. 205. See *The Amérique*, L. R. 6 P. C. 468; *The Cargo ex Schiller*, 2 P. D. 145; *The City of Chester*, 9 P. D. 182. See also *Kay, Shipmasters and Seamen* (2nd ed.), §§ 714-715. Salvage is considered at length, *Abbott, Merchant Ships* (13th ed.), 716-747; 3 *Kent, Comm.* (12th ed.), 245-251; and in *Kennedy, Law of Civil Salvage*. As to the pilot's relation with the master, *The Diana*, 1 W. Rob. (Adm.) 131, at 136; *The City of Cambridge*, L. R. 5 P. C. 451; *The Rigborgs Minde*, 8 P. D. 132; *The Ripon*, 10 P. D. 65.

⁶ *The Meteor*, Ir. R. 9 Eq. 567.

⁷ *The Margaret*, 94 U. S. (4 Otto) 494.

tow a vessel into a port, though not a common carrier nor an insurer (the highest possible degree of skill and care is therefore not required of her), is still bound to exercise reasonable skill and care in everything relating to the work till it is accomplished. The want of either skill or care in such cases is a gross fault, and she is liable for the want of either to the extent of the damage sustained. She is bound to know the channel of her home port, how to reach it, and whether in the state of the wind and water it is safe and proper to attempt to enter with a tow.

The law as between the towing and towed vessel is succinctly stated by Lord Kingsdown, delivering the judgment of the Privy Council in *The Julia*:¹ "When the contract," *i.e.*, of towage, "was made the law would imply an engagement that each vessel would perform its duty in completing it; that proper skill and diligence should be used on board of each; and that neither vessel, by neglect or misconduct, would create unnecessary risk to the other, or increase any risk which would be incidental to the service undertaken. If, in the course of the performance of this contract, any inevitable accident happened to the one, without any default on the part of the other, no cause of action could arise. Such an accident would be one of the necessary risks of the engagement to which each party was subject, and could create no liability on the part of the other. If, on the other hand, the wrongful act of either occasioned any damage to the other, such wrongful act would create a responsibility on the party committing it, if the sufferer had not by any misconduct or unskilfulness on her part contributed to the accident."²

Law as between towing vessel and towed vessel. *The Julia*.

This rule of law is illustrated in *Spaight v. Tedcastle*,³ where the plaintiff's ship was in the charge of a licensed pilot, under whose recommendations a tug was engaged. While being towed the plaintiff's ship took the ground and sustained serious damage. The accident was found to have arisen from the misconduct of the tug, though the ship, by misconduct on her part, contributed to the accident. The House of Lords, reversing the Irish Courts, held

Spaight v. Tedcastle.

¹ 14 Moo. P. C. C. 210, at 230, Lush. 224. See the law laid down in very similar terms: *Sturgis v. Boyer*, 24 How. (U. S.) 110; *Smith v. St. Lawrence Tow-Boat Company*, L. R. 5 P. C. 308; *The Energy*, L. R. 3 A. & E. 48.

² The tug must be seaworthy: *The United Service*, 3 P. D. 56, 9 P. Div. 3. If the tug supplies the tow-rope, it must be sufficient: *The Robert Dixon*, 4 P. D. 121, 5 P. Div. 54. In *The Undaunted*, 11 P. D. 46, it was held that the implied obligation that the tug shall be efficient is not set aside by a proviso against negligence of the master.

³ 6 App. Cas. 217. The duty of the tug is discussed in *The Steamer Webb*, 14 Wall. (U. S.) 406, and in *Sewell v. British Columbia Towing and Transportation Company*, 9 Can. S. C. R. 527, where the conclusions arrived at coincide with those in *Spaight v. Tedcastle*, *supra*. As to when towage should be employed, see *The Nevada*, 106 U. S. (16 Otto) 154. There is no maritime lien for ordinary towage services: *Westrup v. Great Yarmouth Steam Carrying Company*, 43 Ch. D. 241. The legal effect of a contract to tow, and of misconduct or negligence of the tug occasioning danger, are treated at length by Lord Kingsdown in *The Minnehaha*, Lush. 335, at 347; also when the contract of towage passes into a claim for salvage, *The Liverpool* (1893), P. 154.

Ground of the judgment of the House of Lords stated by Lord Blackburn.

that the plaintiff could recover; overruling the contentions of the respondents, that if those in charge of the ship had, in some earlier stage of the navigation, taken a course or exercised a control over the course taken by the tug, which they did not actually take or exercise, a different situation would have resulted, in which the same danger might not have occurred. The immediate cause of the accident was the negligently starboarding the tug's helm. The negligence alleged on the part of the ship was that the compulsory pilot was negligent, and that the captain of the plaintiff's ship was to blame in quitting the deck. Assuming that to be so, the ground of the judgment is stated by Lord Blackburn:¹ "No negligence which was over before the tug negligently starboarded her helm, could be contributory negligence in the sense which is required to relieve the tug from the consequences of that negligence. Be it that there was negligence in the ship, and those for whom the ship was responsible, in letting her get so dangerously near the bank before the helm was ported, as complete as the negligence of those who, in *Davies v. Mann*,² left the fettered donkey dangerously rolling in the road, it forms no defence to an action against the persons who, by want of proper care, have injured the ship. To make a defence on this ground it must be shewn that the injured party, or those with whom for this purpose he is identified, might, by proper care subsequently exerted, have avoided the consequences of the defendant's want of proper care."³

Negligence of pilot co-operating with that of master and crew of colliding ship.

Where the wrongful act done by a pilot on board by compulsion of law is the cause of a collision, we have seen⁴ that, neither at common law nor by statute,⁵ no liability attaches to the owner who has been constrained to employ such person. The question, then, arises, what is the effect of his act upon the amount of damage that should be paid by another ship coming into collision with the ship employing a compulsory pilot, when the injury arises from the negligence of the pilot and the master and crew of the other ship co-operating. It would seem that the owners of the ship employing the pilot not being in any way to blame, and the colliding ship being in fault, the ship in fault should pay the whole of the damages. The rule of the Admiralty, adopted by the Court of Appeal⁶ is different, and is that, where it is found that the navigation of one ship was bad through the wrongful act of

¹ *L. c.* at 226.

² 10 M. & W. 546.

³ *Hoffman v. Union Ferry Company*, 47 N. Y. 176 is the case of negligence in the tug, in using lights, which were not the lights prescribed by Congress, with negligence in a stranger causing injury to the tow.

⁴ *Ante*, 1269.

⁵ 57 & 58 Vict. c. 60, ss. 503 (1) (2), 633.

⁶ *The Hector*, 8 P. Div. 218, at 225; *The Quickstep*, 15 P. D. 196.

the compulsory pilot, her owners recover only half the damage. It must be noted that where the pilot is to blame, though he is personally liable at common law, yet the Court of Admiralty cannot exercise its peculiar jurisdiction over him in an action for damages.¹

The question remains, what is the liability of the owners for injury occasioned by the negligence of some one on board while the vessel is in charge of a compulsory pilot, but acting independently of him. It has been decided that, notwithstanding the responsibility of the pilot for the navigation, the owners are responsible for such negligence or fault.² Nor in a case of joint blame are the owners exempted from liability by having a compulsory pilot on board.³

Liability of owners for act of some one on board while the vessel is in charge of a compulsory pilot.

In summing up to the Trinity Masters in *The Massachusetts*,⁴ Dr. Lushington thus expresses his view of the law in the case of a divided culpability: "If you are of opinion that the accident arose partly from the fault of the pilot in not coming to an anchor in sufficient time, and partly from the defective weight of the anchor, the legal consequence is, that the damage having arisen from the joint default of the pilot and the owners, the responsibility of the loss must fall upon the owners of the ship"—that is, if the accident is in any degree to be imputed to the master, his liability is not affected by the immunity the statute confers on him from responsibility for the defaults or neglects of the pilot.⁵

Divided culpability.

The owner is not liable for damage caused by a collision brought about while his ship is going into dock under a harbour-master's directions, in pursuance of a statutory authority.⁶

Liability of owner where ship does injury when getting into dock under harbour-master's direction in pursuance of statutory powers. Collision while in the charge of compulsory pilot.

To release themselves from liability where a collision is occasioned through the fault of a vessel in charge of a compulsory pilot, the owners have not only to shew that the crew was under the pilot's orders at the time of the order being given which produced the collision, but, further, that the order was such as the pilot was "solely" responsible for;⁷ of this the proof should be

¹ *The Urania*, 10 W. R. 97; *The Alexandria*, L. R. 3 A. & E. 574; *Flower v. Bradley*, 44 L. J. Ex. 1; *The Queen v. Judge of City of London Court* (1892), 1 Q. B. 273.

² *Yates v. Brown*, 25 Mass. 22, per Parker, C.J., at 23; cp. *Bussey v. Donaldson*, 4 Dallas (Pa.) 206.

³ *Netherland Steamship Company v. Styles*, 9 Moo. P. C. C. 286.

⁴ 1 W. Rob. (Adm.) 371, at 373.

⁵ *The Girolamo*, 3 Hagg. (Adm.) 169, at 176.

⁶ *The Bilbao*, Lush. 149; *The Cynthia*, 2 P. D. 52; and *The Belgic*, 2 P. D. 57 n. As to refusal to obey the dockmaster, *The Excelsior*, L. R. 2 A. & E. 268. As to a plea of custom, *The Hand of Providence*, Swa. (Adm.) 107. As to a harbour master's liability, see *The Rhosina*, 10 P. D. 24, 131; *Shaw, Savill & Albion Company v. The Timaru Harbour Board*, 15 App. Cas. 429; *The Apollo* (1891), App. Cas. 499; *Reney v. Magistrates of Kirkcudbright* (1892), App. Cas. 264; *Wright v. Lethbridge*, 7 Times L. R. 125 (C. A.).

⁷ *The Schwalbe*, 14 Moo. P. C. C. 241; *The Velasquez*, L. R. 1 P. C. 494; *The Livia*, 25 L. T. (N. S.) 887. The position of the anchor is a matter within the scope of the pilot's responsibility: *The Monte Rosa* (1893), P. 23.

strict;¹ when it is proved, the defendants are entitled to costs.²

Relation between the towed vessel and any independent vessel with which it may come into contact.

There remains to consider the relation between the towed vessel and any independent vessel with which the towing vessel may come into contact during the operation of towing.³

The judgment in *The Cleaddon*⁴ concludes that the towing and the towed vessel with regard to strangers may be considered as a single whole, the motive power being in the steamer and the governing part in the ship towed. And in the case we have just been considering the duty of the tug is said to be to carry out the directions received from the ship.⁵

Distinction where "governing power" is in the tug.

A distinction is pointed out in *The American* and *The Syria*,⁶ where the "governing power" is in the tug, and not in the vessel towed. As it is the presence of this power in the towed vessel that establishes the rule of liability, so, when that power is absent, the liability ceases. Allowance, too, must be made for the diminished power of manœuvring consequent on having a ship in tow;⁷ but, if the pilot on the ship is guilty of negligence, the tug is not of necessity thereby discharged; for it then becomes the duty of those on the tug to act on their own responsibility for the avoiding of injury. This is pointed out in the "*Civilta*" and the "*Restless*,"⁸ where a ship with a pilot on board and being towed, came into collision with a schooner. "Both vessels," said the Court,⁹ "were responsible for the navigation as has already been seen, the ship because her pilot was in general charge, and the tug because of the duty which rested on her to act upon her own responsibility in the situation in which she was placed. The tug was in fault, because she did not on her own motion change her course so as to keep both herself and the ship out of the way; and the ship, because her pilot, who was in charge both of ship and tug, neglected to give the necessary directions to the tug, when he saw or ought to have seen that no precautions were taken by the tug to avoid

The "*Civilta*" and the "*Restless*."

¹ *The Carrier Dove*, 2 Moo. P. C. C. (N. S.) 260. The burden of proof of compulsory pilotage is on those setting up the defence: *The Hanna*, L. R. 1 A. & E. 283.

² *The Royal Charter*, L. R. 2 A. & E. 362.

³ 3 Kent, Comm. (12th ed.), 232, n. (d), by Mr. Holmes, *Vessels in Tow*.

⁴ 14 Moo. P. C. C. 92; *The Ticonderoga*, Swa. (Adm.) 215, explained in *The Tasmania*, 13 P. D. 110, at 116, where *The Druid*, 1 W. Rob. (Adm.) 391, is considered. *The Druid* was the case where a master of a tug, who in order to extract payment of a sum of money he demanded, recklessly towed a vessel into collision. It was held the tug was not responsible. See also *The Leamington*, 32 L. T. (N. S.) 69; *The Ticonderoga*, Swa. (Adm.) 215; *The Siquasi*, 5 P. D. 241; *The Bianca*, 8 P. D. 91.

⁵ *Spaight v. Tedcastle*, 6 App. Cas. 217.

⁶ L. R. 6 P. C. 127.

⁷ *The La Plata*, Swa. (Adm.) 220, 298; *The Independence*, Lush. 270, 14 Moo. P. C. C. 103.

⁸ 103 U. S. (13 Otto) 699. As to the rule of damages, *The "Virginia Ehrman"* and the "*Agness*," 97 U. S. (7 Otto) 309; *The "City of Hartford"* and the "*Unit*," 97 U. S. (7 Otto) 323.

⁹ 103 U. S. (13 Otto) per Waite, C.J., at 702.

the approaching danger. Had either the ship or the tug done its duty, under the circumstances there could have been no collision."

The decision in *The Niobe*¹ is the necessary outcome of these principles.² There Sir James Hannen held that, where a tug with a vessel in tow comes into collision with another vessel, the towed vessel is liable; since the towed vessel is bound to exercise control over the tug, and not merely to allow herself to be drawn, or the tug to go, in a course which will cause damage to another vessel. To this, again, there is an exception where the accident is caused by some sudden manœuvre of the tug which the towed vessel could not control. In the case of *The Niobe* it was further contended that the *Niobe* was not liable because the mischief was not done by contact with her. The basis of the liability, however, is not physical impact, so much as a neglect of the duty to use that directing and forewarning agency which is rendered necessary by the position assumed.³

Moreover, if the negligence is that of the compulsory pilot, though the tow is clearly not liable, a question has been raised whether the exoneration extends to the tug.⁴ On the analogy of the cases, where a pilot, not compulsory, is in charge of the tow, there would appear no just ground for this as an universal contention; since, in the event of negligence in the pilot, those in charge of the tug are to act on their own responsibility. In the case of no orders being given, this is clearly so;⁵ while, in the case of definite orders being given, very probably it is otherwise; since, as Sir James Hannen points out in *The Niobe*,⁶ in addition to the presence of the pilot, "the officers of the tow are usually . . . of a higher class, and better able to direct the navigation, than those of the tug;" and allowing for exceptional cases of palpably wrong orders, the liability seems a harsh one. Dr. Lushington, in *The Duke of Sussex*,⁷ followed by *The Christina*,⁸ was of the opinion that the tug should be as much under the control of the pilot as the tow, and that the owner of the tug should be equally protected.

¹ 13 P. D. 55. In *The Isca*, 12 P. D. 34, the relative duties of the master of the vessel and the master of the tug are explained.

² *The Mary*, 5 P. D. 14; *The Jane Bacon*, 27 W. R. 35.

³ As to the duty of a tug in charge of canal boats in America, *Arctic Fire Insurance Company v. Austin*, 69 N. Y. 470; *The Margaret*, 94 U. S. (4 Otto) 494; *The Quickstep*, 9 Wall. (U. S.) 665. As to the law in England where two or more ships are in tow of the same tug, *Harris v. Anderson*, 14 C. B. N. S. 499; *Smith v. St. Lawrence Tow-Boat Company*, L. R. 5 P. C. 308.

⁴ *The Lochlibo*, 7 Moo. P. C. C. 427, approved in *The Oakfield*, 11 P. D. 34; *The Ocean Wave*, L. R. 3 P. C. 205.

⁵ *The "Civita"* and the "*Restless*," 103 U. S. (13 Otto) 699; *The Sinquasi*, 5 P. D. 241.

⁷ 1 W. Rob. (Adm.) 270.

⁶ 13 P. D. 55, at 59.

⁸ 3 W. Rob. (Adm.) 27.

The Mary.

In *The Mary*,¹ Sir Robert Phillimore distinguishes the two last-mentioned cases, though, in the case before him, the tug does not seem to have acted under the orders of the pilot, and further was guilty of independent negligence.² "It has been said, indeed, in various cases," says Sir Robert Phillimore,³ "that the tug and the vessel she has in tow are to be regarded as one vessel, but this rule has only been laid down for the purpose of rendering a ship in tow subject to the rules of navigation applicable to steamers; in that sense only can they be treated as one vessel. The master of the tug has a separate contract and a separate responsibility from the pilot. In one sentence, it is by the exercise of free will that the ship takes the tug; by compulsion of law that she takes the pilot." That the tug may have a separate responsibility from the tow is undoubted; and it seems necessarily to follow that when this separate responsibility exists a liability apart from the tow arises. Yet there may, notwithstanding, be great doubt, in the present state of the authorities, as to what facts will constitute separate responsibility.

The Niobe in the House of Lords.

The decision in *The Niobe* received the approval of the House of Lords in an appeal in the same matter from the Court of Session on an insurance policy.⁴ The policy provided that "if the ship hereby insured shall come into collision with any other ship or vessel and the insured shall in consequence thereof become liable to pay, and shall pay, to the persons interested in such other ship or vessel any sum or sums of money," the underwriters should pay a certain proportion. The House of Lords held that the collision of the tug with the damaged vessel must be taken to have been a collision of *The Niobe* within the meaning of the policy.

Opinion of Lord Selborne.

Lord Selborne,⁵ referring to Lord Kingsdown's words in *The Independence*,⁶ that the tug "may, for many purposes, be considered as a part of the ship to which she is attached; and in *The Cleadon*,⁷ that "the *Cleadon*, being in tow of the tug, it is admitted she and the tug must be considered to be one ship; the motive power being in the tug and the governing power in the ship that was being towed," adopted the view that "where a ship in tow has control over, and is answerable for, the navigation of the tug, the two vessels—each physically attached to the other for a common operation, that of the voyage of the ship in tow, for which

¹ 5 P. D. 14.

² As to the responsibilities involved in employing a tug, see *The Julia*, 14 Moo. P. C. C. 210, Lush. 224. Where there is a thick fog, so that the vessel ought not to move at all, the having a compulsory pilot on board does not release from responsibility: *The Borussia, Swa.* (Adm.) 94, the case of towing a vessel at night from dock to dock. *Post*, 1336.

³ 5 P. D. at 16.

⁴ L. c. at 404.

⁷ 14 Moo. P. C. C. at 97.

⁵ *M'Cowan v. Baine* (1891), App. Cas. 401.

⁶ 14 Moo. P. C. at 115.

the tug supplies the motive power," they may for many purposes properly be regarded as one vessel; and was of opinion that they were so for the purpose in question.

Lord Watson,¹ after stating that the decision went "upon a special rule of law, which has admittedly no application except as between a ship and her tug," thus expressed his view of the sense in which a sailing vessel and the steam tug that has her in tow may be considered to constitute one ship: "The ship and her tug must be regarded as identical, in so far as the two vessels with their connecting tackle must be navigated as if they were one ship, and, the motive power being with the tug, must, in order to comply with the regulations for preventing collision at sea, be steered and manœuvred as if they formed a single steamship; and also, in so far as the ship towed, when she has (as in this case) the control of the tug, and the duty of directing the course of the tug, in accordance with these regulations, is responsible for the natural consequences of the tug being wrongly steered, through the neglect of her officers or crew to perform that duty."

Lord Bramwell dissented, refusing to recognize an exception to the ordinary rules of the construction of contracts.² "I think an Act of Parliament, an agreement, or other authoritative document, ought never to be dealt with in this way, unless for a case amounting to a necessity, or approaching to it. It is to be remembered that the authors of the document could always have put in the necessary words if they had thought fit. If they did not, it was either because they thought of the matter and would not, or because they did not think of the matter. In neither case ought the Court to do it."

In *The Quickstep*³ it was admitted that there was no interference in fact by those on the tow with those on the tug; and the Court held that as to the relations of tow and tug "no general rule can be laid down,"⁴ and that the question of liability must depend on the circumstances of each case—the principle being that stated by Lord Tenterden, C.J., in *Laugher v. Pointer*,⁵ that the liability exists only where the men navigating are to be deemed the servants of the hirer. Where, too, a tug in charge of her own master and crew undertakes to transport another vessel which, for the time being, has neither her master nor crew on board, the tug is necessarily responsible for the proper navigation of both vessels; and the principle is unaffected if "a part or even the whole of the officers and crew of the tow are on board, provided it clearly

¹ (1891) App. Cas. at 407.

² 15 P. D. 196.

³ 5 B. & C. 547, at 578, adopted and approved by the Court of Exchequer in *Quarman v. Burnett*, 6 M. & W. 499. *Ante*, 723.

⁴ L. c. at 409.

⁵ L. c. at 200.

Opinion of
Lord Watson.

Grounds of
dissent of Lord
Bramwell.

The Quick-
step.

appears that the tug was a seaworthy vessel properly manned and equipped for the enterprise, and from the nature of the undertaking and the usual course of conducting it, the master and crew of the tow were not expected to participate in the navigation of the vessel."¹

Canal boats
and barges
in tow.
The L. P.
Dayton.

It is well settled that canal boats and barges in tow are in charge of the tug, and that the latter is liable.²

In the *L. P. Dayton*³ the question of the relative liability of tow and tug was complicated by the tow charging both its own tug and another with negligence. In their defence the tugs, while refraining from imputing negligence to the tow, each sought to exculpate itself by inculcating the other. It was contended on behalf of the tow that a *prima-facie* case of negligence arose, without the necessity of proof of specific acts of negligence by either or both tugs, and that the plaintiff was entitled to a decree, the terms of which, as affecting each of the tugs respectively, would be dependent upon the nature of the evidence which they were bound to produce for the apportionment of the liability between them. In short, that the tow was entitled to stand by secure of the judgment, while the two tugs were fighting out the question of the proportion of damages they were to contribute to the tow. This view, however, did not commend itself to the Court, which considered the burden of proof to rest entirely on the tow to establish a case against either or both of the tugs; and further, that the rule presuming fault in case of collision against a vessel in motion, in favour of one at anchor, was not applicable. So far as the other tug's liability went, the tow was identified with her own tug, "so far, at least, that she cannot escape the consequences if the collision was caused wholly or in part by the fault of that tug." So far as her own tug was concerned, there is no presumption in favour of the tow, "because on her behalf all the alleged negligence is denied, and the contrary allegations of the libel cannot be legally maintained merely by corresponding allegations" in the defence of the other. "To hold otherwise," the Court decided, "would require that in every case as between the tow and its tug the latter should be required affirmatively to establish its defence against the presumption of its negligence. There is no ground in reason or authority, for making such an exception to the general rule, which requires the plaintiff in the first instance, to establish by proof the allegations of its complaint." And in considering this it must also be borne in mind that "as between the tow and its tug the

¹ Per Butt, J., 15 P. D. at 201, adopting the language of Clifford, J., in *Sturgis v. Boyer*, 24 How. (U. S.) 110, at 122.

² Parsons, Law of Shipping, vol. i. 536 n.

³ 120 U. S. (13 Davis) 337.

contract of towage involves a responsibility for loss upon the tug, only by reason of the want of ordinary care; for a tug is not a common carrier, and does not insure the safety of its tow."¹

The liability of the owner of a tug for damage done to the tow by improper navigation of the tow is limited by statute, as in other cases.²

Liability of owner of tug limited by statute.

An engagement to tow does not impose the liability of a common carrier. The burden is always on him who alleges the breach of the contract of towage to shew that there has been negligence or unskilfulness in the performance of the contract. Damage, however, sustained by the tow does not of itself raise the presumption of fault in the tug; and the degree of care required of the tug is no more than "that degree of caution and skill which prudent navigators usually employ in similar services;" and "there may be cases in which the result is a safe criterion by which to judge of the character of the act which has caused it."³

Negligence must be shewn to found liability.

Where the towage contract is partially in the nature of salvage the towing ship is not the less liable for a collision caused by negligence,⁴ though the Courts incline to regard error or negligence in the salvor more leniently than in ordinary cases.⁵ Of course the salvor can recover if he is not guilty of negligence;⁶ but where a collision occurs through the negligent navigation of the salving vessel the damage caused is matter for deduction from the award of salvage.⁷

Where the towage contract partakes of the nature of salvage.

There is no common employment between the servants of the tug and of the tow.⁸ But where it was sought, in accordance with what was stated to be the American usage, to limit the liability of a tug and tow, each of which was to blame for a collision with a third vessel, to judgment for one-half of the entire damage, Butt, J., said he was clearly of opinion that to do so would contravene the law. "It is the right of every one who has sustained damage by the joint negligence of two individuals, and who sues them in tort and obtains judgment against them, to enforce it by execution against one or the other of the defendants, or both of them. That is the right of a plaintiff in a common law

No common employment between servants of the tug and those of the tow.

¹ *L. c.* at 351.

² *Wahlberg v. Young*, 45 L. J. C. P. 783. See Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 503 (1) (2).

³ *The Steamer Webb*, 14 Wall. (U.S.) 406, at 414, followed in *The Propeller Burlington*, 137 U. S. (30 Davis) 386, per Fuller, C.J., at 392.

⁴ *The Thetia*, L. R. 2 A. & E. 365. Towage is defined, "the employment of one vessel to expedite the voyage of another, when nothing more is required than the accelerating her progress": *The Princess Alice*, 3 W. Rob. (Adm.) 138, per Dr. Lushington at 140. As to Salvage, see *ante*, 1272.

⁵ *The C. S. Butler* (No. 4), L. R. 4 A. & E. 178.

⁶ *Mud-Hopper*, 40 L. T. 462; *The City of Chester*, 9 P. D. 182.

⁷ *The Dwina* (1892), P. 58; *The Cheerful*, 11 P. D. 3.

⁸ *The Julia*, Lush. 224. *Ante*, 796 *et seqq.*

action. I see no reason why there should be a different one in an Admiralty action."¹

Liability of shipowner or master limited by charter-party or bill of lading.

So far the common law or statutory aspect of the shipowner's or master's liability has been principally considered. This, however, is most frequently varied by the terms of the charter-party or of the bill of lading.

Definition of a charter-party.

A charter-party² is an agreement in writing by which a shipowner agrees to let an entire ship or part thereof to a merchant for the carriage of goods on a specified voyage or during a specified period for a sum of money which the merchant agrees to pay as freight for their carriage.³

Definition of a bill of lading.

"A bill of lading,"⁴ says Buller, J.,⁵ "is an acknowledgment under the hand of the captain, that he has received (such) goods, which he undertakes to deliver to the person named in that bill of lading. It is assignable in its nature; and by indorsement the property is vested in the assignee."⁶ A bill of lading is not a negotiable instrument⁷ in the sense that a bill of exchange

Bill of lading a symbol only of the ownership of goods covered by it.

¹ The *Avon* and *Thomas Joliffe* (1891), P. 7 at 8. See also *The Englishman and Australia*, 11 Times R. 58; and *ante*, 1181. In addition to the case there cited, the judgment in *Jones v. Pitcher*, 3 Stew. & P. (Ala.) 135 at 158-168 should be looked at.

² 3 Kent, Comm. (12th ed.), 206, note *The Charter-party*. Pothier says: *Le contrat de charte partie est le contrat de louage des navires et bâtiments de mer. Traité des Contrats des Louages Maritimes*, n. 1. See also his derivation of the term. See *Code de Commerce*, Art. 273; also for the earlier English law, *Beawes, Lex Mercatoria* (6th ed.), 187; *Malyne's Lex Mercatoria* (3rd ed.), 97.

³ Wharton, *Law Dictionary*, *sub voce*; Abbott, *Merchant Ships* (13th ed.), 218 *et seqq.* The construction of a charter-party should be liberal to effectuate the intention of the parties, *Dimech v. Corlett*, 12 Moo. P. C. C. 199. As to the construction of charter-parties, *Dahl v. Nelson*, 6 App. Cas. 38; *The Carisbrook*, 15 P. D. 98, and the cases there discussed; also *Tharxis Sulphur and Copper Company v. Morel Brothers* (1891), 2 Q. B. 647; *The Queen v. Judge of City of London Court* (1892), 1 Q. B. 273, per Lord Esher, M.R. at 291.

⁴ 3 Kent, Comm. (12th ed.), 207.
⁵ *Caldwell v. Ball*, 1 T. R. 205, at 216. With this compare what is said in *Pollard v. Vinton*, 105 U. S. (15 Otto) 7: A bill of lading "is an instrument of a twofold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely, and deliver. If no goods are actually received there can be no valid contract to carry or to deliver." "The doctrine is applicable to transportation contracts made in that form by railway companies and other carriers by land, as well as carriers by sea": *St. Louis Iron Mountain, &c., Railway Company v. Knight*, 122 U. S. (15 Davis) 79, at 87; *Missouri Pacific Railway Company v. M'Fadden*, 154 U. S. (47 Davis) 155, at 162. See *Barber v. Meyerstein*, L. R. 4 H. L. 317, at 336.

⁶ See *Bills of Lading Act*, 1855 (18 & 19 Vict. c. 111), ss. 1, 2, commented on by Brett, L.J., *Glyn v. East and West India Dock Company*, 6 Q. B. Div. 475, at 482: see also *Burdick v. Sewell*, 13 Q. B. Div. 159, 10 App. Cas. 74. As to the effect of a mortgage of a bill of lading under the Act, see per Lord Blackburn, 10 App. Cas. at 97, who also criticizes unfavourably certain *obiter dicta* on the effect of the *Bills of Lading Act* in the "*Freedom*," L. R. 3 P. C. 594. Cp. *Code de Commerce*, art. 281; *Sale of Goods Act*, 1893 (56 & 57 Vict. c. 71), Part iv.; also the *Factors Act*, 1889 (52 & 53 Vict. c. 45). As to redelivery to pledgor of bill of lading to sell goods for pledgee, *North Western Bank v. Poynter*, (1895) App. Cas. 56.

⁷ The history of the negotiability of bills of lading is worth noting. *Lickbarrow v. Mason*, 2 T. R. 63, decided that a *bond-fide* indorsement and receipt of a bill of lading for value effected an absolute transfer of the property. This was reversed in the Exchequer Chamber (1 H. Bl. 357), Lord Loughborough giving the judgment. In 1790, a writ of error was brought before the House of Lords. The judges were consulted; those of the King's Bench said they retained their original opinion. Six judges were

is¹ so as to become available in the hands of a holder without title, since it is not a representative of money but a contract for the performance of a certain duty, and a symbol merely of the ownership of the goods covered by it; and if it is lost or stolen, the ownership of the loser will not be divested thereby.²

In *Glyn, Mills, & Co. v. East and West India Dock Company*,³ Lord Selborne, C., says: "The primary office and purpose of a bill of lading, although by mercantile law and usage it is a symbol of the right of property in the goods, is to express the terms of the contract between the shipper and the shipowner." And Lord

Glyn, Mills, & Co. v. East and West India Dock Company.

in favour of the respondent. The judgment of the House was not given till 1793, when Lord Loughborough was Chancellor (2 H. Bl. 211, 4 Bro. P. C. 57). The opinion of Mr. Justice Buller, which elaborately supported the King's Bench judges, is given *in extenso* in a note 6 East 20. A new trial was awarded, and the judges of the King's Bench declared on a special verdict taken therein that they retained their former opinion, and accordingly gave judgment without discussion, see 5 T. R. 683. In 1883, in *Burdick v. Sewell*, 10 Q. B. D. 363, at 374, Field, J., says: "Lord Loughborough's judgment has never been followed, and, upon the contrary, the judgment of Buller, J., has. . . . The opinion of Buller, J., has always been taken as the law, and been adopted and followed as the law up to the present day." But Lord Blackburn in the House of Lords, 10 App. Cas. at 100, says: "Neither can I at all agree in the opinion expressed by Field, J., that the opinion of Buller, J." (which six judges to three had thought wrong) "has always been taken as the law, and been adopted and followed as the law up to the present day. It never was published till 1805 in a note to 6 East 20. I have for many years been of opinion, and still remain of opinion, that much of what Buller, J., expresses in that opinion as to stoppage *in transitu*, was peculiar to himself and was never adopted by any other judge, and is not law at the present day." The law as to stoppage *in transitu* is elaborately discussed in the notes to *Wiseman v. Vandeputt*, 2 Vern. 203, and *Whitehead v. Anderson*, 9 M. & W. 411, in *Tudor, L. C.*, on *Mercantile Law* (3rd ed.), 410-463. The American cases are collected, *Parsons, Law of Shipping*, vol. i. 479-524.

¹ The intention of the whole transaction has to be regarded: *Coxe v. Harden*, 4 East 211; *Shepherd v. Harrison*, L. R. 5 H. L. 116; *Pease v. Gloahac*, *The Marie Joseph*, L. R. 1 P. C. 219, at 227; *Thompson v. Dominy*, 14 M. & W. 403. In *Means v. Bank of Randall*, 146 U. S. (39 Davis) 620, a transfer of a bill of lading was held to transfer the ownership of the cattle covered by it.

² *Shaw v. Railroad Company*, 101 U. S. (11 Otto) 557, where Strong, J., speaking of a Pennsylvanian statute which declared that bills of lading "shall be negotiable by indorsement and delivery," and of a Missouri statute which added the words "in the same manner as bills of exchange or promissory notes," says, at 565, "Bills of Lading are regarded as so much cotton, grain, iron, or other articles of merchandise. The merchandise is very often sold or pledged by the transfer of the bills which cover it. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions. It cannot be, therefore, that the statute which made them negotiable by indorsement and delivery, or negotiable *in the same manner* as bills of exchange and promissory notes are negotiable, intended to change totally their character, put them *in all respects* on the footing of instruments which are the representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negotiation of bills and notes. Some of these consequences would be very strange, if not impossible, such as the liability of indorsers, the duty of demand *ad diem*, notice of non-delivery by the carrier, &c., or the loss of the owner's property by the fraudulent assignment of a thief." As to the voyage indicated in the bill of lading and its limits, and when evidence is admissible to shew deviation, see *Leduc v. Ward*, 20 Q. B. Div. 475; *Margetson v. Glyn* (1892), 1 Q. B. 337.

³ 7 App. Cas. 591. See 18 & 19 Vict. c. 111; *Jessel v. Bath*, L. R. 2 Ex. 207; *Frazer v. Telegraph Construction Company*, L. R. 7 Q. B. 566, at 571; *Sewell v. Burdick*, 10 App. Cas. 74; *Bristol and West of England Bank v. Midland Railway Company* (1891), 2 Q. B. 653; *Leduc v. Ward*, 20 Q. B. Div. 475. For interpretation of deviation clause, see *Glyn v. Margetson* (1893), App. Cas. 351.

Hatherley says, in *Barber v. Mayerstein*,¹ "When the vessel is at sea and the cargo has not yet arrived, the parting with the bill of lading is parting with that which is the symbol of property, and which for the purpose of conveying a right and interest in the property, is the property itself."

Bill of lading collusively signed.

As then a bill of lading is but the symbol of goods, a bill collusively signed between the agent of the defendants and a third party, in the absence of goods, will not charge the principal.² An exception to this rule, however, exists where the true owner by negligence has put it in the power of another ostensibly to occupy his position; he may thereby become estopped from asserting his right as against a purchaser, who has been misled to his hurt by reason of such negligence.³

Master's signature to bills of lading *prima facie* evidence of the truth of their contents.

Since the master is the shipowner's agent in the making of every usual contract, his signature to the bills of lading is sufficient evidence of the truth of their contents to throw upon the shipowner the *onus* of falsifying them; so that though the master has no authority to sign for a greater quantity of goods than is actually put on board, yet if he has done so the bill is presumptive evidence that the goods stated have been actually shipped till it is displaced by other evidence.⁴ But so soon as it is shewn that the goods or some of them were not put on board, the shipowner is discharged from this *prima facie* liability.⁵

Acknowledgment by master as to condition of goods.

An acknowledgment by the master as to the condition of goods received on board extends only to the external condition of the cases excluding any implication as to the quantity or quality of the article, its condition when received on board, or whether properly packed or not in the boxes; and if the defendant's evidence raises a reasonable inference of damage resulting from imperfection in

¹ L. R. 4 H. L. 317, at 326, quoted per Lord Blackburn, 7 App. Cas. 604. For the duty of the seller in dealing with the bill of lading, *Sanders v. Maclean*, 11 Q. B. Div. 327. Apart from express contract or mercantile usage there is no legal duty making it incumbent on the charterer to deliver all the bills of lading or copies of them to the shipowner, though without them the consular manifest cannot be drawn up: *Dutton v. Powles*, 2 B. & S. 174.

² *Friedlander v. Texas and Pacific Railway Company*, 130 U. S. (23 Davis) 416; *Cox v. Bruce*, 18 Q. B. D. 147; *Grant v. Norway*, 10 C. B. 665; *British Mutual Banking Company v. Charnwood Forest Railway Company*, 18 Q. B. D. 714.

³ *Gurney v. Behrend*, 3 E. & B. 622, at 634.

⁴ *M'Lean v. Fleming*, L. R. 2 H. L. Sc. 128; *Hubbersty v. Ward*, 8 Ex. 330. Cp. *Missouri Pacific Railway Company v. McFadden*, 154 U. S. (47 Davis) 155.

⁵ *Brown v. Powell Duffryn Steam Coal Company*, L. R. 10 C. P. 562, where the effect of sec. 3 of the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), making the master's signature to a bill of lading conclusive evidence against him when in the hands of a *bond fide* consignee for value, was discussed. As to the function of a bill of lading between shipowner and charterer where there is a charter-party, and as to the value of a bill of lading indorsed over as between the shipowner and the indorsee, see *Leduc v. Ward*, 20 Q. B. D. 475. Where, as in the latter case, the bill of lading is a receipt for the goods, it is not conclusive, and may be controverted by evidence shewing that the goods were not received: *ibid.*

the goods themselves when packed, or before, the burden is thrown upon the plaintiff to rebut this.¹

In some cases the claim of the shipper against the shipowner is wholly defeated by the existence of a charter-party. Two propositions of law are clear: first, that in the common case of goods shipped on board a vessel, of which the shipment is acknowledged by a bill of lading signified by the master, if the goods are not delivered, the shipper has a right to maintain an action against the owner of the ship; second, that if the person in whom the absolute property of the ship is vested chartered that ship to another for a particular voyage, although the absolute owner provides the master, crew, provisions, and everything else, and is to receive from the charterer of the ship a certain sum of money for the use and hire of the ship, an action can be brought only against the person to whom the absolute owner has chartered the ship and who is considered the owner *pro tempore* during the voyage for which the ship is chartered. It cannot be maintained against the person who has let out the ship on charter, that is, against the absolute owner.² *Primâ facie*, however, the shipowner is responsible,³ and his liability continues till a demise of the ship is shewn.⁴ When a demise of the ship is established the charterer is liable to the exoneration of the owner;⁵ and further, "I know of no principle or authority," says Lord Watson,⁶ "which requires that notice must be given when an owner parts, even temporarily, with the

Charter-party may defeat claim of shipper against shipowner.

Liability when demise of ship is established.

¹ *Clark v. Barnwell*, 12 How. (U. S.) 272. When there is no bill of lading the mere receipt of the goods will bind. This is agreeable to the Civil Law. *Recipit autem salum fore utrum si in navem res missæ, ei assignatæ sunt, an etiam non sint assignatæ, (whether there is a bill of lading or not) hoc tamen ipso quod in navem missæ sunt, receptæ videntur*: D. 4, 9, 1, § 8. Where goods are received, "weight, value, and contents unknown," the acknowledgment of the master as to the condition of the goods extends only to the external condition of the case: *Parsons, Law of Shipping*, vol. i. 197, cited by Brett, J., *Lebeau v. General Steam Navigation L. R. 8 C. P. 88*, at 92; see also per Denman, J., at 99. As to the law of stoppage *in transitu*, see per Lord Blackburn, *Kemp v. Fisk*, 7 App. Cas. 573, at 585, where it is said that a common course in the case of the insolvency of one to whom goods are sold and consigned, is to give notice to the shipowner, in order for him to send it to the master, and it then becomes the shipowner's duty to forward it with reasonable diligence to the master; *Bethell v. Clark*, 20 Q. B. D. 615, approved *Lyons v. Hoffnung*, 15 App. Cas. 391; *Delaunier v. Wyllie*, 17 Rettie 167. If during the transit the property in goods is transferred by the consignee's indorsement and delivery of the bill of lading, the consignor loses his right to stop in transit: *Cuming v. Brown*, 9 East 506. The whole subject is fully discussed, *Abbott, Merchant Ships* (13th ed.), 669-715. The earliest reported case on the subject appears to be *Wiseman v. Vandeputt*, 2 Vern. 203.

² *Colvin v. Newberry*, 1 Cl. & F. 283, at 297; *Wagstaff v. Anderson*, 5 C. P. D. 171.

³ *The St. Cloud, B. & L. (Adm.) 4*, at 15.

⁴ *Sandemann v. Sourr*, L. R. 2 Q. B. 86. In the *Omoa*, &c. Coal and Iron Company v. Huntley, 2 C. P. D. 464, the master and crew were held servants of the shipowner under a charter-party giving the charterers very extensive powers because the master "remained in all respects accountable for the manner in which the vessel might be navigated." Cp. *Wagstaff v. Anderson*, 5 C. P. D. 17.

⁵ *Baumwoll Manufactur von Scheibler v. Gilcrest* (1892), 1 Q. B. 253, (1893), App. Cas. 8. The cases are collected and discussed, 3 Kent, Comm. (13th ed.), 133-138.

⁶ (1893) App. Cas. at 21.

possession and control of his ship in order to prevent the servant of the charterer from pledging his credit."

Master *prima facie* agent of the shipowner.

Still, as the master is *prima facie* the agent of the shipowner, a contract made by the shipper with the master concludes the shipowner till the existence of a charter is shewn, in effect demising the ship, and means of knowledge of this on the part of the shipper.¹

Shipowner liable where voyage abandoned, unless there is utter unreasonableness in continuing it.

In the case of an agreement by charter-party to deliver goods, unless prevented by excepted perils, the shipowner remains liable to an action for breach of the charter-party, where the ship is compelled to put into port to repair, and the voyage is then abandoned, unless physical inability to complete the journey is shewn, or at least the utter unreasonableness of doing so from a business point of view.²

Negligence clause in bill of lading when no corresponding clause in charter-party.

Once more—a difficulty sometimes arises between shipowners and charterers with reference to the application of a negligence clause in the bill of lading limiting the liability of shipowners when there are no such clause in the charter-party. In *Wagstaff v. Anderson*,³ Bramwell, L.J., expresses his opinion that a bill of lading is not a contract "superseding, adding to, or varying the former contract under the charter-party," and again, in *Sewell v. Burdick*,⁴ in the House of Lords, speaking of the expression "the contract contained in the bill of lading," he says, "To my mind there is no contract in it. It is a receipt for the goods, stating the terms on which they were delivered to and received by the ship, and therefore excellent evidence of those terms, but it is not a contract. That has been made before the bill of lading was given." These expressions were adopted by the Court in *Rodonachi v. Milburn*⁵ as correctly stating the law, Lord Esher, M.R., there adopting what was said by Lord Bramwell in *Sewell v. Burdick*, and holding "that as between the shipowner and the charterer the bill of lading, although inconsistent with certain parts of the charter, is to be taken only as an acknowledgment of the receipt of the goods." And in the Scotch case of *Delauvier v. Wyllie*⁶ the proposition was formulated "as between the ship-

¹ The *St. Cloud*, B. & L. (Adm.) 4, 15. See *Baumwoll Manufactur von Scheibler v. Gilchrest* (1892), 1 Q. B. 253, at 263 (1893). App. Cas. 8. In an action on a charter-party it was held that where defendants prevent the performance of a condition precedent by neglect or default the plaintiff is placed in the same position as if the condition had been performed by him, *Hotham v. The East India Company*, 1 T. R. 638.

² See judgment of Collins, J., *Assicurazioni Generali v. SS. Beasie Morris Company* (1892), 1 Q. B. 571, where the cases are collected and reviewed, affirmed (1892) 2 Q. B. 652.

³ 5 C. P. Div. 171, at 177.

⁴ 10 App. Cas. 74, at 105.

⁵ 17 Q. B. D. 316, at 320, 18 Q. B. Div. 67, at 75. Cp. *Gledstanee v. Allen*, 12 C. B. 202.

⁶ 17 Rettie 167, at 192. *De Clermont v. General Steam Navigation Company*, 7 Times L. R. 187, is a judgment by Wright, J., on the liability for the loss of goods received "subject to the conditions contained in bill of lading to be issued for the same," and lost before the bill of lading is exchanged for mate's receipt, when the bill of lading contains an exception covering the loss but not known to the shipper.

owners and the charterers, the charter-party always overrides the bill of lading."

On a bill of lading a question may arise as to the personal liability of the shipowner as distinguished from his liability for the negligence of the master or mariners which is usually excepted under the negligence clause of the bill. This clause does not usually except such personal liability. If, for example, the shipowner "employs as master of the ship a person who was known to be of drunken habits, and it is shewn that the collision or loss is the result of the drunkenness of the captain on a particular occasion, that I should say would be personal negligence on the part of the shipowner, and he would be liable. Or if in order to favour some relation of his own he appoints as master of the ship a person who has not reasonable knowledge, skill, and capacity, and if the loss is shewn to have resulted from that want of reasonable knowledge, skill, and capacity, the shipowner would be liable. Or if the shipowner gives written instructions to his captain that upon the vessel entering into a certain port, although he should have a pilot before entering that port, he is not to have one on board, and by reason of his not having a pilot the ship be lost, there would be negligence on the part of the shipowner and he would be liable."¹

Personal
liability of
shipowner.

These instances of the shipowner's personal liability are, of course, illustrative only and not exhaustive.

The early bills of lading do not contain any exceptions to the risks of the adventure.² The first set of exceptions in use was only of "the act of God, the King's enemies, and dangers of the sea."

Exceptions in
bill of lading.

As the result of the case of *Smith v. Shepherd*³ (in which, however, there does not seem to have been any bill of lading), the words of the exceptions were extended to "the act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, excepted."

Of late years the number and extent of exceptions have greatly increased, till they now provide against almost every occurrence. The "negligence clause" in a bill of lading most usually protects the carrier from liability for loss or damage occasioned (1) by causes beyond his control; (2) by the perils of the sea or other waters; (3) by fire from any cause; (4) by barratry of the master or

¹ Per Brett, L.J., *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Company*, 10 Q. B. Div. 521, at 532. As to the law of liability of the master to his other servants for employing incompetent servants, *ante*, 783, *et seqq.*

² Scrutton, *Charter-parties and Bills of Lading* (3rd ed.) 168, referring to West, *Symbolography* (eds. 1632 and 1647), printing a bill of lading dated 1598, at § 659 in the edition of 1647, which is the only one in the Inner Temple Library.

³ Abbott, *Merchant Ships* (13th ed.), 459.

crew; (5) by enemies; (6) by pirates or robbers; (7) by arrest and restraint of princes, rulers, or people, riots, strikes, or stoppage of labour; (8) by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances; (9) by collision; (10) by stranding or other accidents of navigation of whatsoever kind, even when occasioned by the negligence, default, or error of judgment in the pilot, master, mariners, or other servants of the shipowner, not resulting, however, in any case, from want of due diligence by the owners of the ship or any of them, or by the ship's husband or manager.¹

(1) Act of God.

(1) We have already considered what are the constituents of an act of God.²

(2) Dangers of the sea.

(2) The dangers of the sea are also usually excepted.³ Under these words, as was said in an American case, where the import of the phrase, "the dangers of the river," was considered, "the perils of the sea, and of the river, are so nearly allied, that they may be considered the same, except in the few instances in which the reason differs," nor is the distinction always clear between the dangers of either and those arising from the 'acts of God or the public enemies.'"

Not co-extensive with inevitable accident or dangers of the seas.

Some American cases have gone further and assumed an identity between an "act of God" and "dangers of the sea," as, for example, *Crosby v. Fitch*,⁴ where the Court says: "The act of God, inevitable accident, dangers of the sea, &c., are expressions of very similar legal import, and excuse a loss, whether they are repeated in a bill of lading or not." This identification is not correct in English law. An "act of God" is undoubtedly a peril of the seas, but a peril of the sea is by no means an act of God. For example, a man rolled a rock into the channel of a river whereon the first vessel that came along struck; this was held a "danger of the river," though certainly not the "act of God."⁵

Importance of the distinction.

The importance of the distinction is seen in this, that where loss occurs through the act of God it is immaterial whether there be a bill of lading or not, since the shipowner is excused by the common law; on the other hand, if a loss occur through a peril of the sea the shipowner is liable if he does not shew some special contract of carriage; of which the most usual evidence is a bill of lading.

¹ Scrutton, *Charter-parties and Bills of Lading*, (3rd ed.) 307. *Abbott, Merchant Ships* (13th ed.), *Exceptions in Bills of Lading and Charter-parties*, 491-512.

² *Ante*, 1061.

³ As to perils of the sea, *Abbott, Merchant Ships* (13th ed.), 481-490.

⁴ *Jones v. Pitcher*, 3 *Stew. & P. (Ala.)* 135, at 176. The admirable and exhaustive judgment of Safford, J., in this case should be referred to, 142-181.

⁵ 12 Conn. 410, at 419. See, too, *Fish v. Chapman*, 2 *Kelly (Ga.)*, 349, at 356.

⁶ *Chouteaux v. Leech*, 18 Pa. St. 224. See per Cockburn, C.J., *Nugent v. Smith*, 1 C. P. Div. 423; and per Lord Esher, M.R., *Pandorf v. Hamilton*, 17 Q. B. Div. 670, at 675.

Foundering is the most obvious instance of loss by a peril of the sea;¹ and proof of a ship having sailed from a given port, and never having arrived at the announced port of her destination, with the existence of a rumour at the port of departure that she has foundered, has been held sufficient *prima facie* evidence of the fact.²

Shipwreck³ is also a case of loss by a peril of the sea, and so are the losses consequential upon it.⁴ So are losses brought about by stranding,⁵ pirates,⁶ a sunken rock, an iceberg, a swordfish,⁷ wreckers,⁸ dangers received in docking the ship in the course of the voyage,⁹ but not otherwise.¹⁰

The definition of peril of the sea given by Lopes, L.J., has been approved—"a sea damage occurring at sea, and nobody's fault."¹¹

Definition by
Lopes, L.J.,
of danger or
accident of
the sea.
Hamilton v.
Pandorf.

The case in which this was said—*Hamilton v. Pandorf*¹²—is valuable as settling the often litigated point whether damage done by rats on shipboard constitutes a peril of the sea. In the earlier cases, like *Laveroni v. Drury*¹³ and *Kay v. Wheeler*,¹⁴ damage done by rats to cargo was not held to constitute a peril of the sea excusing the shipowner, under a bill of lading. In *Hamilton v. Pandorf* rats gnawed a hole in a pipe on board ship whereby sea-water damaged a cargo of rice without neglect or default of the shipowners or their servants. The House of Lords, reversing the Court of Appeal, held this to constitute a danger of the sea for which the shipowner was not liable.

¹ Cp. Pothier, d'Assurance, Nos. 119, 122.

² *Koster v. Reed*, 6 B. & C. 19; Park, Marine Insurances (8th ed.), vol. i. 147.

³ As to goods wrecked to whom they belong, Vin. Abr. Wreck. Beawes, Lex Mercatoria (6th ed.), vol. i. 236-240.

⁴ *Dent v. Smith*, L. R. 4 Q. B. 414; *The Norway*, in P. C., B. & L. (Adm.) 404; 3 Moo. P. C. C. (N. S.) 245.

⁵ In order to constitute a stranding the ship must be stationary, "so that the ship may, *pro tempore*, be considered as wrecked": *McDougle v. Royal Exchange Assurance*, 4 M. & S. 503; if she gets off again, however much she is injured, she is not stranded: *Harman v. Vanx*, 3 Camp. 429; 3 Kent, Comm. 323. See further, *Fletcher v. Inglis*, 2 B. & Ald. 315; *Phillips v. Barber*, 5 B. & Ald. 161; *Carruthers v. Sydebotham*, 4 M. & S. 77; all cited and considered in Lord Herschell's opinion in *Thames and Mersey Marine Insurance Company v. Hamilton, Fraser & Company*, 12 App. Cas. 484, at 495-7. *Corcoran v. Gurney*, 1 E. & B. 456, and *De Mattos v. Saunders*, L. R. 7 C. P. 570, may also be referred to, both cited in *Letchford v. Oldham*, 5 Q. B. D. 538, where the definition of "stranding" in *Wells v. Hopwood*, 3 B. & Ad. 20, and *Kingsford v. Marshall*, 8 Bing. 458, is adopted.

⁶ *Pickering v. Barkley*, Style (K. B.) 132, Roll. Abr. Parolls. (C) Exposition, pl. 10. Mutinous seizure by passengers has been held piracy, *Palmer v. Naylor*, 10 Ex. 382. See also per Lord Kenyon, C.J., *Nesbitt v. Lushington*, 4 T. R. 783; *Kleinwort v. Shepard*, 1 E. & E. 447; and Lord Blackburn's remarks, *Cory v. Burr*, 8 App. Cas. 393, at 402.

⁷ *Arguendo* in *Hamilton v. Pandorf*, 12 App. Cas. 518, at 522.

⁸ *Bondrett v. Hentigg*, Holt (N. P.) 149.

⁹ *Laurie v. Douglas*, 15 M. & W. 746.

¹⁰ *Phillips v. Barber*, 5 B. & Ald. 161.

¹¹ 16 Q. B. Div. at 635.

¹² 12 App. Cas. 518; *The Bedouin* (1894), P. 1.

¹³ 8 Ex. 166, approved 12 App. Cas. at 523. See per Lord Halsbury, C., 12 App. Cas. at 523, referring to *Laveroni v. Drury* as reported in 22 L. J. Ex. 2.

¹⁴ L. R. 2 C. P. 302. See per Bowen, L.J., *Pandorf v. Hamilton*, 17 Q. B. D. 670, at 683.

Distinction
between
Hamilton v.
Pandorf and
the earlier
cases.

The distinction between this and the earlier cases was pointed out to be, that in them the damage was done to the cargo by rats in a manner indistinguishable whether in a warehouse or by sea, while in the present case the damage would not have happened except at sea, so as to bring it within the definition of Lopes, L.J. : "In a seaworthy ship damage to goods caused by the action of the sea during transit, not attributable to the fault of anybody, is, in my opinion, a danger or accident of the seas, intended to come within the exception, and exonerating the shipowner."¹

Thames and
Mersey Marine
Insurance
Company v.
Hamilton.

In connection with *Hamilton v. Pandorf* must be noticed *Thames and Mersey Marine Insurance Company v. Hamilton*,² also in the House of Lords, and where judgment was delivered on the same day. A donkey-engine was being used for the purpose of pumping water into the main boilers of a steamer, when, a valve which should have let the water into the boiler being stopped, a part of the pump burst. This was contended to be a loss from a peril of the sea ; since it was necessary to fill the boiler to enable the ship to prosecute her voyage. To this contention the reply was that the accident had nothing to do with the sea, as it was an accident that might have happened anywhere. This view was adopted by the House. "Sea perils or the like," said the Lord Chancellor,³ referring with disapproval to the contrary effect of a then recent decision of the Court of Appeal,⁴ "become enlarged into perils whose only connection with the sea is that they arise from machinery which gives motive power to ships." "I cannot think that such casualties were in the contemplation of the parties when using the old familiar words of this policy,"—perils of the sea and all other perils, &c. "I think the subject-matter, marine risks, limits the meaning of the general words. I think the genus 'perils of the sea,' limits the meaning."⁵

¹ 16 Q. B. Div. at 633. In *The Cressington* (1891), P. 152, mischief from the inflow of water to the hold of a vessel in the course of navigation, was held a peril of the sea and an accident of navigation.

² 12 App. Cas. 484.

³ L. c. at 491.

⁴ *West India and Panama Telegraph Company v. Home and Colonial Marine Insurance Company*, 6 Q. B. Div. 51. The course of the authorities is marked and the cases criticized by Lord Herschell, in *Thames and Mersey Marine Insurance Company v. Hamilton, Fraser & Company*, 12 App. Cas. 484, at 495-498.

⁵ The following have been held to be not losses by "peril of the sea":—Injuries to the ship's hull by worms, *Bohl v. Parr*, 1 Esp. (N. P.) 445—see this case discussed per Lord Esher, M.R., *Pandorf v. Hamilton*, 17 Q. B. Div. 670, at 677 ; by reason of members of a crew being taken by a pressgang, *Hodgson v. Malcolm*, 2 B & P. (N. R.) 336 ; by a vessel firing on another by mistake, *Cullen v. Butler*, 5 M. & S. 461 (as to this, however, Lord Herschell says : "I think this expression of opinion stands alone, and has not been sanctioned by subsequent cases": *The Xantho*, 12 App. Cas. 503, at 509) ; by damage from war, *The Patria*, L. R. 3 A. & E. 436 ; by damage from want of ventilation arising from the necessity of keeping the hatches closed in bad weather, *The Freedom*, L. R. 3 P. C. 594 ; by barratry, *The Chasca*, L. R. 4 A. & E. 446. As to the exception of "robbers," see *De Rothschild v. Royal Mail Steam Packet Company*, 7 Ex. 734 ; of "thieves," *Taylor v. Liverpool and Great Western Steam Company*, L. R.

Considerable controversy has existed whether a loss by collision is a "peril of the sea" within the exception in a bill of lading that excuses the shipowner.

Question, whether a loss by collision is a peril of the sea.

Parsons¹ states the law as follows: "When the cargo is lost or damaged by a collision between the carrier vessel and another, the liability of the carrier depends upon the nature of the collision, and also upon the obligation he has assumed. A collision may be caused by the fault of neither ship, that is, by inevitable accident; by the fault of the carrier ship, by the fault of the other ship, and by the fault of both. If neither vessel is in fault, the collision is clearly a peril of the seas,² and under some circumstances may clearly be an act of God. If the carrier vessel is in fault, she is clearly liable. If the other vessel is entirely in fault, the loss is not an act of God, but is a peril of the seas, and the liability of the carrier depends in such a case upon the obligation he has assumed."³

Of the cases put, those where there is no negligence, and where there is negligence of the carrying ship, are undisputed. With regard to the third—where there is fault or negligence in the other vessel—*Brett, L.J., in Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Company*,⁴ took a view different from that of Parsons in the passage just set out, and considered that if a collision was caused without any fault on the part of the carrying ship, but by reason of the negligence on the part of those responsible for the other ship, that was not "an accident of the sea,"⁵ and consequently the shipowner would not be protected.

Fault or negligence not in the carrier ship, but in the other vessel. *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Company.*

9 Q. B. 546, and *Steinman & Company v. Angier Line* (1891), 1 Q. B. 619; 3 Kent, Comm. 303; *Abbott, Merchant Ships* (13th ed.), 460. *Ante*, 1064. As to loss by "improper navigation," where damage was done to cargo by water coming into the hold through a port negligently left open, though the navigation of the ship was not injured thereby, *Carmichael v. Liverpool Sailing Shipowners' Association*, 19 Q. B. D. 242; *Canada Shipping Company v. British Shipowners' Mutual Protecting Association*, 22 Q. B. D. 727, 23 Q. B. Div. 342; *The Ferro* (1893), P. 38; *Abbott, Merchant Ships* (13th ed.), 861. Failure to case pipe, whereby water got amongst the cargo, was held "default in the navigation of the ship," in *Gilroy v. Price*, (1839) App. Cas. 56. Damage by a rive t working loose, whereby the cargo was damaged by sea water, was held a "peril of the sea," in *The Cressington* (1891), P. 152. What constitutes a "peril of the sea," is discussed in *Ionides v. Universal Marine Insurance Company*, 14 C. B. N. S. 259. See also *Thompson v. Whitmore* (1810), 3 Taunt. 227; a loss occasioned by another ship running down the ship insured through gross negligence is a loss by "peril of the sea": *Smith v. Scott*, 4 Taunt. 126.

¹ *Law of Shipping*, vol. i. 259; *The Woodrop Sims*, 2 Dodson (Adm. Cas.) 83, at 85; also *post*, 1312, *Collisions on Water*.

² *Buller v. Fisher, Peake* (Add. Cas.) 183, per Lord Kenyon.

³ *Hays v. Kennedy*, 41 Pa. St. 378; *The Steamboat New Jersey, Olcott* (U.S. Adm.) 444, at 448. "Collision or stranding is doubtless a 'peril of the seas'": *Liverpool Steam Company v. Phenix Insurance Company*, 129 U. S. (22 Davis) 397, at 438. Loss occasioned by detention from ice is not a peril of the seas: *Great Western Insurance Company v. Jordan*, 14 Can. S. C. R. 734. As to what is a loss within the general words "all other perils": *Cullen v. Butler* (1816), 5 M. & S. 461; *Davidson v. Burnand* (1868), L. R. 4 C. P. 117.

⁴ 10 Q. B. Div. 521, at 530.

⁵ "An accident is that which happens without the fault of anybody, and consequently a collision, which is the fault of somebody, is not an accident of the seas," per *Brett, L.J., L. c.* at 530. See *Brazin v. The Steamship Company*, 3 Wall. Jr. (U.S. Circ. Ct.), 229 at 239.

This expression of opinion was not necessary for the decision; since, in the case in question, both ships were in fault; while, further, there was a stipulation in the bill of lading that the ship-owners should be exempted from liability for any consequences of neglect or default of the master or crew in the navigation of the vessel; and thus there was a definite contract. The decision was upon the effect of this contract, which was held valid, and which exonerated the defendants because they had contracted to be exonerated in the event that happened, viz., the negligence of the crew, of the carrying ship.

Woodley v. Mitchell. Brett, L.J. reiterates the opinion expressed in the former case;

which is adopted by the rest of the Court, and re-affirmed in *The Xantho*.

The Xantho reversed in the House of Lords.

Lord Herschell's opinion in the House of Lords.

Statement of the law as settled by the decision in *The Xantho*.

In the subsequent case of *Woodley v. Mitchell*,¹ the question became material, and Brett, L.J., enforced his view, that "although a collision when brought about without any negligence of either vessel is or may be a peril of the sea, a collision brought about by the negligence of either of the vessels, so that without negligence it could not have happened, is not a peril of the sea within the terms of that exception in a bill of lading." The rest of the Court² concurred. The Court of Appeal³ re-affirmed its decision in *The Xantho*;⁴ where Brett, L.J., thus⁵ formulated the rule laid down in *Woodley v. Mitchell*:⁶ "that if the cause of the loss was the negligence of the crew of either vessel without the winds or waves or any extraordinary difficulty of navigation contributing to the accident, such a loss, the cause being negligence, did not fall within the exceptions in the bill of lading."

The Xantho was then carried to the House of Lords⁷ as an appeal against *Woodley v. Mitchell*, and the decision of the Court of Appeal overruled. The *ratio decidendi* of the House of Lords is thus expressed by Lord Herschell:⁸ "I am unable to concur in the view that a disaster which happens from the fault of somebody can never be an accident or peril of the sea; and I think it would give rise to distinctions resting on no sound basis, if it were to be held that the exception of perils of the seas in a bill of lading was always excluded when the inroad of the sea which occasioned the loss was induced by some intervention of human agency."

This decision brings the English law again into conformity with the American law, as laid down by Parsons, and sanctioned by decisions. The law may now be stated, to be that if a collision is in no way the default of defendants, they are entitled to judgment whether there be fault in third parties, or there be no fault anywhere. The rule seems to work out

¹ 11 Q. B. Div. 47.

² Fry, L.J., was sitting in place of Cotton, L.J.

³ 11 P. Div. at 173.

⁴ 11 P. Div. 170.

⁵ 11 Q. B. Div. 47.

⁶ 12 App. Cas. 503, under the name of Wilson, Sons & Company v. Owners of Cargo per the *Xantho*.

⁷ L. c. at 511.

⁸ Cotton and Bowen, L.JJ.

as follows: In an action by cargo-owners, the plaintiffs would have to prove the non-delivery of goods at the end of the voyage. The defendants would then be put to shew that they were prevented from delivering the goods by some cause covered by an exception in the bill of lading. They might shew, for example, that the loss was from a collision. This, however, would not be enough, since loss by collision is perfectly consistent with a loss by their negligence; from which, as the *onus* would be on them, they would have to clear themselves. So soon as they shew that the collision was without negligence on the part of their vessel, a conclusive defence is proved; since it is immaterial whether there is no negligence or negligence by a third person over whom they have no control; as in either event they have brought themselves within an excepted peril of the sea.¹

An important limitation to this is suggested by *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Company*,² where both vessels colliding happened to be the property of the defendants. The action was by the owners of the cargo, who were held disentitled to recover on the contract of carriage, as there was an exception against the negligence of master or crew; and the jury found that the loss was partly due to such negligence. The plaintiffs also sued the defendants in tort, as the owners of the other ship, for the negligence of their servants, the master and crew of that vessel, whereby the collision was mainly occasioned. The Queen's Bench Division decided in favour of the plaintiffs, on the ground that defendants had not shewn that the loss was occasioned wholly by the neglect or default of their servants on the carrying ship. This was held erroneous in the Court of Appeal; it then became necessary to consider the other point. The fact that both ships were the property of the same owner was decided not to affect the ordinary rule that a shipowner is liable for the negligence of the master and crew of his ship³ (the provisions in the bill of lading had reference only to the carrying ship, and not generally to all ships and crews of the defendants), and the law applicable to cases of collision on the high seas is the maritime law as administered in England, and not the law of the flags.⁴ Thus, whether the collision were within the

Limitation in
Chartered
Mercantile
Bank of India
v. Netherlands
India Steam
Navigation
Company.

Case in the
Court of
Appeal.

¹ Per Lord Bramwell, 12 App. Cas. at 513.

² 10 Q. B. D. 521.

³ The *Milan*, Lush. 388.

⁴ The *Johann Friedrich*, 1 W. Rob. (Adm.) 35; The *Leon*, 6 P. D. 148. The principles governing in Courts of Admiralty in dealing with maritime causes arising between foreigners and others on the high seas, are elaborately considered in The *Belgenland*, 114 U. S. (7 Davis) 355. The conclusions arrived at are:—

1. Any Court of Admiralty which first obtains jurisdiction of the rescued or offending ship at the solicitation in justice of the meritorious or injured parties may inquire into the case though both ships are foreigners.

realm or without the realm on the high seas, the defendants were equally liable. But the bill of lading of the carrying ship provided that the defendants were not to be liable for negligence of the master or crew of that ship. Therefore they were relieved from that portion of the loss attributable to the carrying vessel, by virtue of the exception. By the rule of the Admiralty Court, preserved by the Judicature Act, 1873,¹ however, where both ships are in fault, each ship becomes liable for half of the joint loss; in the present case, as to the half that was referable to the negligence of the carrying ship the owners were excused by virtue of the exception in the bill of lading; there remained, then, the half attributed to the other ship; for which judgment was given for the plaintiffs.

Summary.

Thus, to the rule that where there is no negligence by the carrying ship in the event of a collision, when the ship is sailing with a bill of lading excepting perils of the sea, there is a limitation that when both ships, the carrying ship and the colliding ship, are the property of the same owners, the owners are liable for the colliding ship, irrespectively of the existence or non-existence of negligence on the part of the carrying ship. If there be no negligence on the part of the carrying ship, then the common owners are liable to the owner of the cargo to the full extent, by virtue of their ownership of the negligent ship: if both ships are negligent, the owner's liability by virtue of the Admiralty rule is limited to one-half, provided that there is an exception in the bill of lading of the negligence of the master and crew of the carrying ship.

Effect of the decision in The Bernina.

Since the case of *The Bernina* in the House of Lords,² the cargo owner can recover at common law the whole loss that he may sustain either from the ship in which his cargo is carried or from the ship that collides against it. The effect of the pro-

2. The Court should not do so where the ships are governed by the laws of the country to which the parties belong and there is no difficulty in resorting to those Courts, or where they have agreed to resort to no other tribunals.
3. In the cases last mentioned Courts of Admiralty will not decline jurisdiction because they do not possess it, but from motives of convenience or international comity they will use a discretion whether to exercise jurisdiction or not.
4. Where the question in dispute is one *communis juris*, the strong presumption is in favour of the exercise of jurisdiction.
5. The law applicable between parties or ships of different nationalities, is the general maritime law as understood and administered in the Courts of the country in which the litigation is prosecuted, subject to this that there is no liability for following the sailing rules of one's own government. The general sailing regulations are presumed to bind unless the contrary appears.
6. If the maritime law of both nations is the same with respect to any matter of liability or obligation, such law if shewn to the Court should be followed in that matter in respect of which they so agree, though it differ from the maritime law as understood in the country of the forum.

See *The Queen v. Judge of City of London Court* (1892), 1 Q. B. 273.

¹ 36 & 37 Vict. c. 66, s. 25, sub-s. 9.

² *Mills v. Armstrong*, 13 App. Cas. 1. *Ante*, 203.

vision of the Judicature Act just cited is, that the rule of Admiralty is to govern; by that the innocent owner of cargo proceeding against one only of two delinquent ships may recover only half the damage, and will be left with respect to the other half to the remedy against the other delinquent vessel. This was continuously held to be the Admiralty rule, even during the period that *Thorogood v. Bryan*¹ was followed in the common law Courts. Dr. Lushington refused to be bound by that case, "because it is a single case; because I know upon inquiry that it has been doubted by high authority; because it appears to me not reconcilable with other principles laid down at common law; and, lastly, because it is directly against *Hay v. Le Neve*, and the ordinary practice of the Court of Admiralty."²

With these cases *Simpson v. Thomson*³ deserves notice. Two Simpson v. Thomson. ships, the property of one owner, came into collision. The underwriters paid the insurance effected on the lost ship, and then claimed to rank with the owners of cargo destroyed, in the distribution of the fund lodged in Court by the owner on account of the ship which did the damage. The First Division of the Court of Session sustained this claim, but their judgment was reversed in the House of Lords. "Either," said Lord Cairns, C., "the policy by which the underwriters are bound is an insurance against perils of the seas arising from the negligent navigation of any other vessel, even although that vessel belong to the person insured, or it is not. If it is not an insurance against such a peril of the sea, the underwriters should defend themselves accordingly, and decline to pay for the loss. If, on the other hand, the insurance is a contract to indemnify against the consequences of the negligent navigation of any other ship of the insured, it would be little short of an absurdity that the underwriters should, in the first place, indemnify the insured for the consequences of that negligent navigation according to their contract, and immediately afterwards recover the amount back from the insured as damages occasioned by this negligent navigation." Lord Cairns's statement of the law.

The effect of payment of a total loss by the insurer may be stated to be that of working an equitable assignment to the insurer both of the property and also of all remedies which Effect of payment of a total loss by the insurer.

¹ 8 C. B. 115.

² *The Milan*, Lush. 388; *Hay v. Le Neve*, 2 Shaw (H.L. Sc.) 396, at 405. The rule in the United States is thus stated in the "*City of Hartford*" and the "*Unit*," 97 U. S. (7 Otto) 323, at 329: "That wrongful acts done by the co-operation and joint agency of two or more parties constitute them all wrong-doers, and that parties in a collision case, such as shippers and consignees, bear no part of the loss in such a disaster, and are entitled to full compensation for the damage which they suffer from the wrong-doers, except in the case where their loss exceeds the amount of the interest which the owners of the offending ship or ships have in them, and in the freight then pending."

³ 3 App. Cas. 279.

the insured has against the carrier for the recovery of its value.¹

(3) Loss by fire.

(3) Another exception incorporated into special contracts for the conveyance of goods by sea is against liability for loss by fire. A fire caused by lightning, of course, brings no liability, since it is referable to the act of God.²

Occasioned by the negligence of the master or crew.

In insurance cases it was for a long time contested whether a fire occasioned by the negligence of the master or crew discharged the insurers. The liability has now been decided to attach both here and in America, though the decisions are not altogether uniform.³ In England the point was settled by *Busk v. The Royal Exchange Insurance Company*,⁴ upon the general ground that *causa proxima non remota spectatur*; and therefore that a loss whose proximate cause is one of the enumerated risks in the policy is chargeable to the underwriters, although the remote cause is traceable to the negligence of the master and mariners. In that case the risk of barratry⁵ was also assumed by the underwriters; but the judgment of the Court went on the general principle, which was, in a later case, thus formulated by Bayley, J.:⁶ "Underwriters are liable for a loss, the proximate cause of which is one of the enumerated risks, though the remote cause may be traced to the negligence of the master and mariners."

Busk v. The Royal Exchange Insurance Company.

Pink v. Fleming.

The same principle, it may be here remarked, was emphasized, though in different circumstances, in the case of *Pink v. Fleming*,⁷

¹ *Mobile and Montgomery Railway Company v. Jurey*, 111 U. S. (4 Davis) 584.

² *Ante*, 1064. Cp. *ante*, 567 *et seqq.*, particularly at 600.

³ *Busk v. Royal Exchange Assurance Company*, 2 B. & Ald. 73; per Parke, B., *Dixon v. Sadler*, 5 M. & W. 405, at 414; per Tindal, C.J., *s.c.* 8 M. & W. 895, at 898. The American cases are found in 3 Kent, Comm. 303-304. The words "direct loss or damage by fire," in a policy, are pointed out in *California Insurance Company v. Union Compress Company*, 133 U. S. (26 Davis) 387, at 415, to mean "loss or damage occurring directly from fire as the destroying agency, in contradistinction to the remoteness of fire as such agency." "Remoteness of agency is the explosion of gunpowder, gases, or chemicals, caused by fire; the explosion of steam boilers; the destruction of buildings to prevent the spread of fire, or their destruction through the falling of burning walls; and so forth." As to when a ship is "burnt," *The Glenlivet* (1893), P. 164 (1894), P. 48 (C. A.). In *Gordon v. Rimmington*, 1 Camp. 123, the captain burnt the ship to prevent her from falling into the hands of the enemy. This was held a loss by fire within the meaning of a policy of insurance.

⁴ 2 B. & Ald. at 82; the principle was affirmed in *Walker v. Maitland*, 5 B. & Ald. 171, and in *Bishop v. Pentland*, 7 B. & C. 219. Amongst the American cases see *Patapeco Insurance Company v. Coulter*, 3 Peters (U. S.) 222; *Columbia Insurance Company of Alexandria v. Lawrence*, 10 Peters (U. S.) 507; and *Orient Insurance Company v. Adams*, 123 U. S. (16 Davis) 67; 3 Kent, Comm. 300.

⁵ See *post*, 1299.

⁶ *Bishop v. Pentland*, 7 B. & C. 219, at 223.

⁷ 25 Q. B. Div. 396. It may be noted that "to constitute a total loss within the meaning of a policy of marine insurance, it is not necessary that a ship should be actually annihilated or destroyed; it may, as in the case of capture and sale upon condemnation, remain in its original state and condition; it may be capable of being repaired if damaged; it may be actually repaired by the purchaser, or it may not even require repairs. If it is lost to the owner by an adverse valid and legal transfer of his right of property and possession to a purchaser by a sale under a decree of a Court of competent jurisdiction in consequence of a peril insured against, it is as much a total

where perishable goods were insured by a marine policy against damage consequent on collision. The ship in which they were insured was injured by a collision, rendering it necessary to put into port for repairs, the execution of which necessitated the unloading a portion of the goods. When the repairs were completed the goods were re-shipped, and the ship continued her journey. On arrival at her destination it was found that the goods had been damaged by the handling. The insured brought an action on the policy in respect of this, but were held disentitled to recover; Lord Esher, M.R., in the Court of Appeal, pointing out¹ that it is well settled by the law of England that there is a distinction between cases of marine insurance and those of other liabilities: "In the case of an action for damages on an ordinary contract, the defendant may be liable for damage of which the breach is an efficient cause or *causa causans*; but in cases of marine insurance only the *causa proxima* can be regarded."² . . . "According to the law of marine insurance, the last cause only must be looked to and the others rejected, although the result would not have been produced without them. Here there was such a succession of causes. First, there was the collision. Without that, no doubt, the loss would not have happened. But would such loss have resulted from the collision alone? Is it the natural result of a collision that the ship should be taken into a port for repairs, and that the cargo should be removed for the purposes of the repairs, and that, the cargo being of a kind that must be injured by handling, it should be injured in such removal? A collision might happen without any of these consequences." . . . "To connect the loss with any peril mentioned in the policy, the plaintiffs must go back two steps, and that, according to English law, they are not entitled to do." The case was further considered by the Court to be covered by the principle enunciated in *Taylor v. Dunbar*.³

Distinction pointed out by Lord Esher, M.R.

Taylor v. Dunbar.

In a bill of lading or a charter-party, the exception against loss by fire will only protect where the damage is not attributable to negligence for which the shipowner is responsible, since an undertaking by the shipowner is implied that the master and the crew

Negligence for which shipowner is responsible producing fire.

loss as if it had been totally annihilated": *Cosman v. West*, 13 App. Cas. 160, at 169, citing *Mullett v. Shedden*, 13 East 304. The whole law of abandonment is discussed by Lord Abinger, delivering the judgment of the Exchequer Chamber, in *Roux v. Salvador*, 3 Bing. N. C. 266, at 275; *Tudor L. C. on Mercantile Law* (3rd ed.), 166, with notes, 184-224; see *Fleming v. Smith*, 1 H. L. C. 513; *Rankin v. Potter*, L. R. 6 H. L. 83, 121, 127, 129. The leading United States case is *Marshall v. The Delaware Insurance Company*, 2 Wash. (U. S. Circ. Ct.) 54, 4 Cranch (U. S.) 202, *Hare & Wallace, American Leading Cases*, 664; see also the succeeding cases, 690-755; *Richelieu Navigation Company v. Boston Marine Insurance Company*, 136 (U. S.), (29 Davis) 408, contains references to the later decisions.

¹ L. c. at 397.

² See *ante*, 93.

³ L. R. 4 C. P. 206. Cp. *Reischer v. Borwick* (1894), 2 Q. B. 548.

shall use ordinary care with regard to the carriage of the goods.¹ If, however, the case set up is that there has been negligence, the burden of proof will be on the shipper, unless the facts of the case themselves shift the burden of proof, as in the illustration put by Willes, J., in his judgment in *Czech v. General Steam Navigation Company*.²

Distinction between the interpretation of the exceptions in a policy of insurance and in a bill of lading.

Notice may here be taken of a distinction often urged as the basis of argument between the interpretation of exceptions in a policy of insurance and in a bill of lading. The former is an absolute contract to indemnify for loss by peril of the sea; the latter is to carry with reasonable care, unless prevented by excepted perils. In an action on the former, then, "it is only necessary to see whether the loss comes within the terms of the contract, and is caused by perils of the sea;" while in an action on the latter, "if the goods are not carried with reasonable care, and are consequently lost by perils of the sea, it becomes necessary to reconcile the two parts of the instrument, and this is done by holding that, if the loss through perils of the sea is caused by the previous default of the shipowner, he is liable for this breach of his covenant."³

Woodley v. Michell.

In *Woodley v. Michell* the Court of Appeal acted on the principle that, where perils of the sea are excepted in a bill of lading, the Court are to go behind the *causa proxima* and look at what is the real or efficient cause of the loss, and were consequently of opinion that, negligence being involved, the plaintiffs were entitled to recover. In *The Xantho*, Lord Herschell dissents from this view:⁴ "If that which immediately caused the loss was a peril of the sea, it matters not how it was induced [that is, in the case of a marine policy], even if it were by the negligence of those navigating the vessel. It is equally clear that in the case of a bill of lading you may sometimes look behind the immediate cause, and the ship-

Opinion of Lord Herschell in *The Xantho*.

¹ *Lloyd v. General Iron Screw Collier Company*, 3 H. & C. 284; *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Company*, 10 Q.B.D. 521. Where through the negligence of the shipowner the mariners barratrously smuggled goods on board whereby the ship was seized and forfeited, underwriters were held not liable on a policy of insurance: *Pipon v. Cope*, 1 Camp. 434.

² L. R. 3 C. P. 14, at 19; *Transportation Company v. Downer*, 11 Wall. (U.S.) 129. In *The Glendarroch* (1894) P. 226, Lord Esher, M.R., speaking of the shifting of the burden of proof under a charter-party with an exception of loss by a peril of the sea says at 231: "I think that according to the ordinary course of practice each party would have to prove the part of the matter which lies upon him. The plaintiffs would have to prove the contract and the non-delivery. If they leave that in doubt, of course they fail. The defendants' answer is, 'Yes; but the case was brought within the exception—within its ordinary meaning.' That lies upon them. Then the plaintiffs have a right to say there are exceptional circumstances, viz., that the damage was brought about by the negligence of the defendants' servants, and it seems to me that it is for the plaintiffs to make out that second exception."

³ Per Willes, J., *Grill v. General Iron Screw Collier Company*, L. R. 1 C. P. 600, at 611 and 612.

⁴ 11 Q. B. D. 47.

⁵ 12 App. Cas. 503, at 510; *The Southgate* (1893), P. 329.

owner is not protected by the exception of perils of the sea in every case in which he would be entitled to recover on his policy on the ground that there has been a loss by such perils. But I do not think that this difference arises from the words 'perils of the sea' having a different meaning in the two instruments, but from the context or general scope and purpose of the contract of carriage excluding in certain cases the operation of the exception. It would, in my opinion, be very objectionable, unless well-settled authority compelled it, to give a different meaning to the same words occurring in two maritime instruments."

In the United States the law has been settled in almost identical terms. It is there laid down by the highest authority,¹ that "a policy of insurance against perils of the sea, covers a loss by stranding or collision, although arising from the negligence of the master, or crew, because the insurer assumes to indemnify the assured against losses from particular perils and the assured does not warrant that his servants shall use due care to avoid them."² On the other hand it is held that the ordinary contract of a carrier involves an obligation to use due care and skill in navigating the vessel and in carrying the goods; while an exception in the bill of lading of perils of the sea or other specified perils does not excuse the carrier from that obligation or exempt him from liability for loss or damage from one of those perils to which the negligence of himself or his servants has contributed.³ But in the same Court it was decided that where a vessel is stranded while going at full speed in a fog the burden of proof is on the insured to shew that the loss is not through want of ordinary care in navigation in a case where such want of care is an excepted peril; for though the fog may be the cause of the accident the other circumstance—the going at full speed—raises a stronger counter presumption; and in the case in question this was even more undoubtedly the case, since going at speed in a fog was contrary to a statutory regulation.⁴

(4) Barratry⁵ has been defined as "not confined to the running away with the ship," but as comprehending "every species of

Liverpool
Steam
Company v.
Phoenix Insur-
ance Company.

¹ *Liverpool Steam Company v. Phoenix Insurance Company*, 129 U. S. (22 Davis) 397, at 438. "It is conclusively settled, in this country and in England, that a policy of insurance, taken out by the owner of a ship or goods, covers a loss by perils of the sea or other perils insured against, though occasioned by the negligence of the master or crew or other persons employed by himself": *Phoenix Insurance Company v. Erie Transportation Company*, 117 U. S. (10 Davis) 312, at 323; *California Insurance Company v. Union Compress Company*, 133 U. S. (26 Davis) 387.

² Cited and adopted *Richelieu Navigation Company v. Boston Insurance Company*, 136 U. S. (29 Davis) 408, at 421.

³ See the authorities for this collected in 129 U. S. (22 Davis), at 438.

⁴ *Richelieu Navigation Company v. Boston Insurance Company*, 136 U. S. (29 Davis) 408.

⁵ *Abbott, Merchant Ships* (13th ed.), 185-186; 3 *Kent, Comm.* (12th ed.), 305. *Vin. Abr. Barretors*; *Com. Dig. Barratry*; *Bac. Abr. Merchant and Merchandize* (1). *Of Marine Insurance, Loss by Barratry.*

fraud, knavery, or criminal conduct in the master by which the owners or freighters are injured.¹ Ignorance or mere negligence is not sufficient; there must be fraud,² or at least wilful misconduct.³

Negligence of
the crew.

In *Davidson v. Burnand*,⁴ Willes, J., considered the law regulating loss arising from the negligence of the crew, where the shipowner is suing on a marine policy to have been settled so far back as the year 1839, by the judgment of Parke, B., in *Dixon v. Sadler*.⁵ Treating of the distinction between a loss caused by the negligence, of the crew of another vessel, Willes J., says "All such distinction has been swept away by the judgment of Lord Wensleydale, as I understand it, in the case of *Dixon v. Sadler*."

Dixon v.
Sadler.

In *Dixon v. Sadler*⁶ the declaration was on a time policy; to which the defendant pleaded that though the ship was lost by peril of the sea, yet the loss was occasioned by the negligently and wrongfully throwing over so much ballast that the ship became unseaworthy and was lost by perils that would otherwise have been

¹ *Valejo v. Wheeler*, 1 Cowp. 143, at 155-6.

² *Phyn v. The Royal Exchange Assurance Company*, 7 T. R. 505. See note, *Negligence of Assured*, by Mr. Holmes, 3 Kent, Comm. (12th ed.), 302. The law of abandonment is, says Lindley, J., *Pitman v. Universal Marine Insurance Company*, 9 Q. B. D. 192, at 196, elaborately examined in *Peele v. Merchants' Insurance Company*, 3 Mason (U. S. Circ. Ct.) 27. The chief English cases are *Goss v. Withers*, 2 Burr. 683; *Hamilton v. Mendes*, 2 Burr. 1198; *Milles v. Fletcher*, 1 Doug. 231. In *American Insurance Company v. Ogden*, 20 Wend. (N. Y.) 287, it was held that if ground for abandonment is the result of culpable negligence or want of due diligence on the part of the owner or his agent, the insurer is not liable; and if there was a want of ordinary prudence in the owner in furnishing funds or credit to the master to enable him to make the necessary repairs, and the master was without funds available, otherwise an abandonment cannot be made as for a constructive or technical total loss. 3 Kent, Comm. 322. On abandonment either of vessel or cargo, the master becomes the agent of the insurer, and the insured is not bound by his subsequent acts unless he adopts them: 2 Phillips Ins. 439, 449. It is the master's duty to act with good faith and care and diligence for the protection of the property in the interests of whomever it may concern. He may sell the ship in case of necessity, e.g., when the ship is where it is impossible to repair her or to repair her except at a rate exceeding her value; or when he is without money and the means of raising money: *Somes v. Sagrue*, 4 C. & P. 276. *Ante*, 1260 and 1263. In the case of capture both master and mariners are bound, if neutral, to remain and assert the claim till condemnation or till recovery is hopeless: *Marshall v. Union Insurance Company*, 2 Wash. (U. S. Circ. Ct.) 452; *The Saratoga*, 2 Gall. (U. S. Circ. Ct.) 164. If the abandonment be accepted, the underwriter becomes owner for the voyage, and is liable for the seamen's wages and entitled to the freight subsequently earned: *Hammond v. Essex Fire and Marine Insurance Company*, 4 Mason (U. S. Circ. Ct.) 196.

³ *Earle v. Rowcroft*, 8 East 126.

⁴ L. R. 4 C. P. 117.

⁵ 5 M. & W. 405. As to warranty of seaworthiness, see Mr. Holmes, note 3 Kent, Comm. (12th ed.) 288. The leading American case on seaworthiness seems to be *Prescott v. Union Insurance Company*, 1 Whart. (Pa.) 399, 2 Hare and Wallace American Leading Cases. 756-796.

⁶ 5 M. & W. 405, *Tudor L. C. on Mercantile Law* (3rd ed.) 127; in the notes to which the law affecting warranties attaching to policies of marine insurances is fully considered; *Hedley v. Pinkney*, (1894) App. Cas. 222, *West India, &c. Telegraph Company v. Home and Colonial Insurance Company*, 6 Q. B. D. 51, explosion of a boiler is a peril insured against by a marine policy in the ordinary form. A ship insured on condition of sailing with convoy, must, to be seaworthy, be properly equipped with sails so as to be able to keep up with convoy, as well as furnished with a sufficient crew: *Wedderburn v. Bell*, 1 Camp. 1. In a policy of insurance there is a warranty implied on the part of the assured that a captain and crew of competent skill for the voyage is provided: *Tait v. Levi*, 14 East 481.

overcome. The jury found the issue for the defendants. But the Court of Exchequer held that judgment for the plaintiff must be entered *non obstante veredicto*. In delivering the considered judgment of the Court, Parke B., said: "The great principle established by the more recent decisions is, that if the vessel, crew, and equipments be originally sufficient, the assured has done all he contracted to do and is not responsible for the subsequent deficiency occasioned by any neglect or misconduct of the master or crew."¹

Thompson v. Hopper² was the case of a time policy; but there it was pleaded that the plaintiffs sent the ship to sea "at a time when it was dangerous for the ship to go to sea in the state and condition in which she then was," and that they "wrongfully and improperly caused and permitted the said ship to be and remain on the high seas near to the seashore for a great length of time, in the state and condition aforesaid, and without a master and without a proper crew to manage and navigate her on her said voyage; during which time the said ship by reason of the premises became, and was wrecked and wholly lost." On this it was held by the majority of the Queen's Bench,³ that as the misconduct of the plaintiffs personally was alleged as producing the loss a demurrer of the plaintiffs must be disallowed. Lord Campbell, C.J., thus states the law:⁴ "By the English law of insurance the assured are not obliged to keep the ship seaworthy throughout the voyage or during the period of the risk; and if she is lost by supervening unseaworthiness arising from the negligence of the captain the underwriters are liable, as if the ship were burnt from his negligence. But it is a maxim of our insurance law, and of the insurance law of all commercial nations, that the assured cannot seek indemnity for a loss produced by their own wrongful act. The plaintiffs' counsel said truly that the perils of the sea must still be considered the proximate cause of the loss; but so it would have been if the ship had been scuttled or sunk by being wilfully run upon a rock. According to the statement in this plea the plaintiffs efficiently caused the loss by their wrongful act; and if so, I think there was no necessity expressly to characterize that act as being either felonious or fraudulent." Commenting on this

Thompson v. Hopper.

Statement of the law by Lord Campbell, C.J.

¹ This is as to "voyage policies" alone. As to absence of warranty in "time policies," see *ante*, 1254 n. ¹; *Union Insurance Company v. Smith*, 124 U. S. (17 Davis) 405. Parke, B.'s definition of "seaworthiness" is adopted in *Heoley v. Pinkney & Sons' Steamship Company* (1892), 1 Q. B. 58, (1894) App. Cas. 222, as applicable to the liability imposed by sec. 5 of the Merchant Shipping Act, 1876 (39 & 40 Vict. c. 80), now repealed, but re-enacted as s. 458 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60).

² 6 E. & B. 172.

³ Lord Campbell, C.J., Coleridge, J., Wightman, J.

⁴ 6 E. & B. at 191.

Lord Penzance
in *Dudgeon v.*
Pembroke.

case in *Dudgeon v. Pembroke*,¹ Lord Penzance points out that "the knowledge and wilful misconduct of the assured himself was an essential element in the decision arrived at." And that the effect of dispensing with proof of the shipowner's knowledge and wilfulness would be that "whenever the captain failed in his duty in fitly repairing the vessel in a foreign port, and the loss though caused by perils of the sea could be traced to the ship's defective condition, the assured would lose the benefit of his policy. Such a doctrine once established would extend equally to the negligent conduct of the master in the course sailed by the ship, or the careless management of the ship in an emergency, or the absence of reasonable and proper exertion on the part of the captain or crew."²

(5) King's
enemies.
(6) Pirates.

The cases of loss or damage occasioned (5) by the King's enemies, (6) by pirates or robbers, have already been considered.³

(7) Arrests or
restraints of
princes, &c.

(7) Arrests or restraints of princes, rulers, and peoples, riots, strikes, or stoppage of labour, are terms of limitation often added in bills of lading and charter-parties.

This class of exceptions has reference to embargoes⁴ or blockades,⁵ or to the decrees of prize courts,⁶ or other processes resulting in the detention of the cargo; as, for instance, the German investment of Paris.⁷ It does not include ordinary civil process,⁸ nor the act of tumultuous mobs, since "peoples" means "the governing power of the country."⁹

¹ 2 App. Cas. 284. As to the right of underwriters to the exercise of the captain's judgment unfettered by instructions not communicated to them, see *Middlewood v. Blakes*, 7 T. R. 162.

² 2 App. Cas. at 297. For a history of the literature and law on the subject of Marine Insurance, see the judgment of Bradley, J., in *The City of Norwich*, 118 U. S. (11 Davis) 468, at 496-502; also the dissentient opinion in *The Great Western*, same volume, at 531-534. Where property is sold the insurance does not follow it, as the contract of insurance does not attach itself to the thing insured nor go with it when it is transferred: per Lord Hardwicke in *Saddlers' Company v. Badcock*, 2 Atk. 554, and Parke, B., in *Powles v. Innes*, 11 M. & W. 10, at 13. This rule is based, according to Bradley, J., (*The City of Norwich*, 118 U. S. (11 Davis) at 495), on the consideration that the assured "does not take the price of insurance from the thing insured, but takes it out of the general mass of his estate, to which his general creditors have a right to look for the satisfaction of their claims. They are the creditors who have the best right to the insurance."

³ *Ante*, 1064.

⁴ *Rotch v. Edie*, 6 T. R. 413; *Aubert v. Gray*, 3 B. & S. 163.

⁵ *Geipel v. Smith*, L. R. 7 Q. B. 404, where the question of the right of the charterer to throw up the contract was considered. See also *Jackson v. Union Marine Insurance Company*, L. R. 8 C. P. 572 (where Bovill, C.J., dissented), affirmed in the Ex. Ch. L. R. 10 C. P. 125.

⁶ *Stringer v. English and Scottish Marine Insurance Company*, L. R. 5 Q. B. 599.

⁷ *Rodoonachi v. Elliot*, L. R. 9 C. P. 518; *Smith v. Rosario Nitrate Company* (1893), 2 Q. B. 323 (1894), 1 Q. B. 174.

⁸ *Finlay v. Liverpool and Great Western Steamship Company*, 23 L. T. (N. S.) 251.

⁹ *Nesbitt v. Lushington*, 4 T. R. 783, but Lord Kenyon, C.J., says: "I think that this loss falls with a capture by pirates." See, however, *Johnston v. Hogg*, 10 Q. B. D. 432, where the meaning of the terms "capture" and "seizure" are considered. But the restraints must be actual, not merely anticipated, though the anticipation is

(8) The cases of loss by damage occasioned by explosion, (8) Loss by explosion, &c.
bursting of boilers, breakage of shafts or any latent defect in hull, machinery, or appurtenances, have already been sufficiently dealt with.¹

(9) Collision is so large a subject that it will require a chapter (9) Collision.
to itself.²

(10) The case of stranding has been already considered.³

(10) Stranding.

Lastly, the law is now thoroughly settled that the exception in a bill of lading only exempts the shipowner from the liability of a common carrier, and not from the want of reasonable skill, diligence, and care. "This," says Willes, J.,⁴ "is settled, so far as the repairs of the ship are concerned, by the judgment of Lord Wensleydale in *Worms v. Storey*;⁵ as to her navigation, by a series of authorities collected in *Grill v. General Iron Screw Collier Company*;⁶ and as to her management, so far as affects the case of the cargo itself, in *Laurie v. Douglas*;⁷ where the Court (in a judgment unfortunately not reported at large) upheld a ruling of Pollock, C.B., that the shipowner was only bound to take the same care of the goods as a person would of his own goods, viz., 'ordinary and reasonable care.' These authorities, and the reasoning upon which they are founded, are conclusive to shew that the exemption is from liability for loss which could not have been avoided by reasonable care, skill, and diligence, and that it is inapplicable to the case of a loss arising from the want of such care, and the sacrifice of the cargo by reason thereof."

Exception only exempts the shipowner from the liability of a common carrier. Willes, J., in *Notara v. Henderson*.

We have already seen that a condition that the shipowner shall not be liable for negligence of the master, mariners and other servants of the shipowner when clearly introduced into a contract is valid;⁸ still the tendency of the Courts is to construe an exception

Condition that the shipowner not liable for negligence valid.

reasonable: *Atkinson v. Ritchie*, 10 East 530. In *The Teutonia*, the master was informed by the pilot, though incorrectly, that war had been actually declared two days before; it was held that he was entitled to *pause and take a reasonable time* to make further inquiries: L. R. 4 P. C. 171, at 179. In *Atkinson v. Ritchie*, 10 East 530, the master on a general inquiry sailed away without cargo. The exception does not apply to vessels arrested on civil process: *Crew v. Great Western Steamship Company*, W. N. 1887, 161.

¹ *Ante*, 1254 and 1290.

² *Post*, 1312.

³ *Ante*, 1289.

⁴ *Notara v. Henderson*, L. R. 7 Q. B. 225, at 236.

⁵ 11 Ex. 427, at 430.

⁶ L. R. 1 C. P. 600, L. R. 3 C. P. 476.

⁷ 15 M. & W. 746.

⁸ *Ante*, 1252; *Steel v. State Line Steamship Company*, 3 App. Cas. 72, at 88. *Cunningham v. Colvils*, 16 Rettie 295, is a case on "errors or negligence of navigation." In *The Mary Thomas* (1894), P. 108, it was contended (unsuccessfully) in a case of stranding, where the bill of lading excepted stranding, even when occasioned by the negligence of the master, that notwithstanding that the stranding was attributable to the negligent navigation of the master, there was no liability on the part of cargo owners to contribute in general average. *Dickenson v. Jardine*, L. R. 3 C. P. 639, was distinguished. *Manchester, Sheffield, and Lincolnshire Railway Company v. Brown*, 8 App. Cas. 703. In the Supreme Court of the United States, however, a stipulation to this effect has been held invalid as contrary to public policy: *Liverpool Steam Company*

of this character strongly against the shipowner;¹ so that to exempt the shipowner from his liability for a breach of his warranty of seaworthiness the most clear and unambiguous words are necessary.²

Distinction between breach of shipowner's warranty of seaworthiness and defect that may be set right in the course of the voyage.

Some difficulty may, however, be found in discriminating between a breach of the shipowner's warranty of seaworthiness and a defect that may conveniently be set right in the course of the voyage, the omission to do which may be properly imputed to the negligence of the master or crew. *Gilroy v. Price*³ illustrates the difference. There a defect which was the occasion of the injury existed in the ship previously to the loading of the cargo. The cargo was so loaded that access to the defective spot—an uncased pipe—was impossible during the voyage without removing part of the cargo. The House of Lords held this condition of things a breach of the warranty of seaworthiness. It was intimated that if the defect had been the absence of a hatchway that could have been supplied during the voyage while a neglect to fasten it down during the voyage would be within a clause exempting the shipowners from the negligence of mariners, &c.

Effect of the words "all other conditions as per charter."

The words "all other conditions as per charter" do not incorporate into a bill of lading the exception of "stranding occasioned by the negligence of the master," and it has further been held that a casualty which proper foresight and skill in the commanding officer might have avoided—*e.g.*, if a compass on an iron vessel was

v. Phenix Insurance Company, 129 U. S. (22 Davis) 397. In *Missouri Steamship Company, Limited*, Monroe's claim, 42 Ch. D. 321, the effect of this difference in the law of the two countries was discussed in the English Court of Appeal in a claim made by an American citizen, in the winding up of a British steamship company, for damages for the loss of his cattle arising through the negligence of the master and crew. The ship was a British ship, and the charter-party contained express stipulations exempting the company from liability caused by the negligence of the master and crew. The cattle were shipped at Boston, and bills of lading were given there in conformity with the charter-party. The Court of Appeal, affirming Chitty, J., held that the contract was governed by English law. The presumption, however, in the first place, is that the law of the place where the contract is made, governs: *Lloyd v. Guibert*, L. R. 1 Q. B. 115; *Jacobs v. Credit Lyonnais*, 12 Q. B. D. 589; *The Gaetano and Maria*, 7 P. D. 137; *The August* (1891), P. 328; *The Industrie* (1894), P. 58.

¹ *Lyon v. Mells*, 5 East 428; *Hayn v. Culliford*, 3 C. P. D. 410, 4 C. P. Div. 182. Exemption from negligence of "captain, officers, and crew" does not extend to the default of a stevedore. For an extreme case of contracting out of liability for negligence, *Trainer v. Black Diamond Steamship Company of Montreal*, 16 Can. S. C. R. 156; for a description of the negligence proved, see per Ritchie, C.J., at 159, 160, 161. *Cp. Gienar v. Meyer*, 2 H. Bl. 603. *Ante*, 874 n.¹

² *The Duero*, L. R. 2 A. & E. 393; *Heyde v. Swan*, 6 N. S. Wales R. (Law) 33. It may be laid down indeed, as a general rule of construction, that exceptions in a bill of lading are to be construed against the shipowner: *Phillips v. Clarke*, 2 C. B. (N. S.) 156.

³ (1893) App. Cas. 56. *Cp. The Edwin I. Morrison*, 153 U. S. (46 Davis) 199. *Russell v. Niemann*, 17 C. B. (N. S.) 163, is recognized and approved in the House of Lords in the unreported case of *Taylor v. Perrin*. See *Delaurier v. Wyllie*, 17 Rettie 167, at 189 and *Serraino v. Campbell* (1891), 1 Q. B. 283. The exception in a charter-party relieving from payment of demurrage in case of "hands striking work," has been held not to apply to a case of abandonment of work through dread of cholera: *Stephens v. Harris*, 57 L. T. 618. See the same case for the meaning of a stipulation "weather permitting."

not protected so as to travel correctly and an accident resulted—is not to be considered an ‘accident of the sea.’¹

The law we have been considering may be thus summarised: Law summarized.
—If goods are lost or damaged while being carried by sea with the common law liability of a common carrier, the common carrier is liable in any event, unless, that is, he brings himself within the common law exceptions of the act of God, or the king’s enemies; or to revert to the expression of the old law unless the loss was through some cause which left the carrier no remedy over. If the contract of carriage is regulated by a bill of lading, the shipowner, by proving that the loss is within one of the perils excepted by his contract, will be discharged, though not absolutely; since it is within the rights of the plaintiff to prove that the shipowner was negligent. Thus, the attribution of loss to an excepted peril will only exonerate from liability where there has been no negligence; or, if there has been negligence, then there must be a clear exception to that effect to excuse; while in cases outside the exceptions the shipowner is liable even apart from negligence.²

The general rule of law prevails in this branch of law also—it is for the judge to say whether any facts have been established by evidence from which negligence may be reasonably inferred, but it is for the jury to say whether from these facts negligence ought to be inferred.³ Judge to decide whether any evidence of negligence, jury to decide where there is negligence.

As to delivery—the rules of delivery after sea carriage are Delivery. in the main identical with those relating to delivery after land carriage, so that there is little here to be added to the general considerations which have been already presented.⁴

Delivery must be according to the practice and custom usually observed in any port or place of delivery—*i.e.*, the goods are most

¹ *Bazin v. Steamship Company*, 3 Wall. Jun. (U. S. Circ. Ct.) 229; *Richelieu Navigation Company v. Boston Insurance Company*, 136 U. S. (29 Davis) 408; *The Kestrel*, 6 P. D. 182.

² *Ante*, 1241. *Davis v. Garrett*, 6 Bing. 716, approved *Royal Exchange Shipping Company v. Dixon*, 12 App. Cas. 11, at 19; and *Scaramanga v. Stamp*, 5 C. P. Div. 295, per Cockburn, C.J., at 299. In the “*Norway*,” 3 Moo. P. C. C. (N. S.) 245, at 263, it was assumed that, had the pilot been negligent, the owner would be liable; but the decision was, that the facts did not indisputably point to the conclusion of negligence. “It is,” says Lord Watson, “in my opinion, a settled and a salutary principle of mercantile law that the mere employment of a broker, at a foreign port to find a cargo for a ship, and to adjust the terms upon which it is to be carried, does not give him implied power to relieve the master, who signs bills of lading, of his legal duty to the shipowner”: *Stumore, Weston & Company v. Breen*, 12 App. Cas. 698, at 704. As to the duties of masters in signing bills of lading, see *Cox v. Bruce*, 18 Q. B. D. 147. In *Czech v. General Steam Navigation Company*, L. R. 3 C. P. 14, Willes, J., says at 19: “The liability of the defendants for their negligence, notwithstanding the general words of the exception in the bill of lading, has been fully gone into in many cases which have been referred to by my Lord, and I will only add that the law so laid down by our Courts is consistent with the views of modern jurists, and will be found in many of the maritime codes of Europe.” The authorities are referred to in a note to the report most probably by the learned judge.

³ *Metropolitan Railway Company v. Jackson*, 3 App. Cas. 193, at 197.

⁴ *Ante*, 1087.

usually sent to the wharf with directions to the wharfinger not to part with them until the freight and other charges are paid,¹ provided the master be doubtful of payment; since by parting with the possession, the master loses his lien for the freight.²

Master's duty. The master must in any event allow a reasonable time³ for the consignee to receive goods, and is not justified in putting them on the quay as soon as he arrives.⁴ The duty of making proper provision for the discharge of cargo is usually by custom on the consignee;⁵ but the master is bound to give up the goods to the holder of the bill of lading if he presents it (for it is in the nature of a title-deed⁶) at a reasonable time;⁷ and is justified in delivering the goods to the first person who presents a bill of lading (though three have been signed) if it is produced to him in good faith; and he is not to embarrass himself by considering what has become of the others.⁸ If he has any notice or knowledge as to the whereabouts of the other parts of the bill of lading he must interplead, or deliver to the one who he thinks has the better right, at his peril if he is wrong.⁹

Master may warehouse the goods in certain contingencies.

If the consignee or the holder of the bill of lading does not claim delivery within a reasonable time, the master may land and warehouse the goods in a statutable warehouse¹⁰ at the expense of

¹ *Tharsis Sulphur and Copper Company v. Morel Brothers* (1891), 2 Q. B. 647; *Good v. Isaacs* (1892), 2 Q. B. 555. See as to conditions, &c., *ante*, 1078.

² *Abbott, Merchant Ships* (5th ed.), 247, (13th ed.), 446.

³ *Ante*, 1010.

⁴ *Houlder v. General Steam Navigation Company*, 3 F. & F. 170.

⁵ *Per Tindal, C.J., Gatcliffe v. Bourne*, 4 Bing. N. C. 314, at 329; *Ford v. Cotesworth*, L. R. 4 Q. B. 127, L. R. 5 Q. B. 544; *Cunningham v. Dunn*, 3 C. P. D. 443; *Fowler v. Knoop*, 4 Q. B. D. 299; *Hick v. Rodocanachi* (1891), 2 Q. B. 626, considered by *Wright, J., Castlegate Steamship Company v. Dempsey* (1892), 1 Q. B. 54, where charter-parties in common use are divided into three classes: 1st, those in which a limited time is prescribed within which the unloading is to be completed; 2nd, those in which no time is prescribed; 3rd, those in which time is fixed not directly but by reference to the custom of the port of discharge; and the rule governing in each is laid down. *Wright, J.'s* judgment was, however, reversed in the Court of Appeal (1892), 1 Q. B. 854, on the ground that the case was governed by *Postlethwaite v. Freeland*, 5 App. Cas. 599. Under a charter-party providing for discharge at the usual berth as customary, it was held that the obligation to unload did not commence till the ship was in the usual berth; and this did not happen till she was there with the assent of the proper authorities; further, that "customary" has reference to the course of business at the port: *Good v. Isaac* (1892), 2 Q. B. 555, and has no reference to time: *Tapscott v. Balfour*, L. R. 8 C. P. 46; *Lockhart v. Falk*, L. R. 10 Ex. 132, followed in *Dunlop v. Balfour* (1892), 1 Q. B. 507, and in *Gardiner v. Macfarlane*, 16 Rettie, 658. In these cases the signification of the word "demurrage" is considered. See also the Scotch case, *Wyllie v. Harrison*, 13 Rettie, 92; and *The Jaedoren* (1892), P. 351, where the words to be construed were "steamer to be discharged as fast as she can deliver."

⁶ *Postlethwaite v. Freeland*, 5 App. Cas. 599; *Bourne v. Gatcliffe*, 11 Cl. & F. 45.

⁷ *Erichsen v. Barkworth*, 3 H. & N. 601.

⁸ *Per Lord Cairns, Glyn, Mills & Company v. East and West India Docks*, 7 App. Cas. 591, at 598; *Barber v. Meyerstein*, L. R. 4 H. L. 317, per Lord Westbury, at 336. See as to the unlimited proposition stated in *Fearon v. Bowers*, 1 H. Bl. 364, per *Baggaley, L.J.*, 6 Q. B. Div. 503, and in the House of Lords per Lord O'Hagan, 7 App. Cas. 601, per Lord Blackburn, at 610 *et seqq.*, per Lord Fitzgerald, at 616.

⁹ *Per Lord Blackburn*, L. R. 7 App. Cas. at 613.

¹⁰ *Merchant Shipping Act*, 1894 (57 & 58 Vict. c. 60), ss. 493, 494. These ss. are considered, *Furness v. White* (1894), 1 Q. B. 483, reversed in *H. of L.* (1895) App.

the owner.¹ The general rule is that delivery at the wharf in the absence of special directions to the contrary discharges the master.² There must, notwithstanding, be a delivery at the wharf to some person authorized to receive the goods, or due previous notice must be given to the consignee of the time and place of delivery ; and the master cannot discharge himself by leaving them exposed and unprotected at the wharf. So, too, if the master gives a receipt for goods left on the quay for shipping, they are as much at the risk of the ship as if actually put on board. The master's responsibility continues till actual delivery or some act equivalent to, or a substitute for delivery ; as if the consignee has previously assumed charge of the goods ; or has notice of the time and place of delivery and the goods have been duly separated and designated for his use.³ If there is loss through the delay or default of the consignee, the consignee is liable for the same.⁴

Where goods can neither be landed nor remain where they are, it seems a legitimate extension of the implied agency of the master to hold that, in the absence of all advices, he has authority to carry or send them on to such other place as, in his judgment, prudently exercised, appears most convenient for their owner, and to charge the expenses, properly incurred in doing so, on him.⁵

If the master refuses to discharge the cargo the shipowner will

Cas. 40 and are reproductions of ss. 67 and 68 of 25 and 26 Vict. c. 63. Where there is no such warehouse, see *Mors le Blanch v. Wilson*, L. R. 8 C. P. 227. In this case the rule was also laid down that a plaintiff may recover against a defendant, costs incurred in defending an action in respect of matters as to which the defendant is under liability to the plaintiff. "As a general rule," said Bovill, C.J., at 233, "he must not recklessly defend the action, and so heap upon the person eventually liable, unnecessary expense. But, on the other hand, if he places all the facts before the person whom he seeks to charge, and that person declines to intervene, and leaves him to take his own course, it surely must be for the jury to say whether it was reasonable to defend, and whether the defence was conducted in a reasonable manner." In *Baxendale v. London, Chatham, and Dover Railway Company*, L. R. 10 Ex. 35, in the Exchequer Chamber, *Mors le Blanch v. Wilson*, was disapproved (Lush, J., dissenting). But in *Hammond & Company v. Bussey*, 20 Q. B. D. 79, the two earlier cases were discussed, and *Baxendale v. London, Chatham, and Dover Railway Company*, was distinguished and explained on the ground that in the Ex. Ch. the one point discussed was whether the defence in the action, the costs of which were the subject of dispute, was reasonable ; and the Court decided it was not. That being so, the costs sued for could not be recovered. The proposition of law that was negatived in *Baxendale's* case was, therefore, that costs of unreasonably defending an action could be recovered if the incurring such costs had been of use, in leading to the assessment of damages which could be recovered over in the second action against the defendant. But it is at least doubtful whether *Mors le Blanch v. Wilson* did decide this. What that case undoubtedly decided is that costs could be recovered where the action was reasonably defended, and this is good law.

¹ *Howard v. Shepherd*, 9 C. B. 297, at 321 ; *Erichsen v. Barkworth*, 3 H. & N. 601, in Ex. Ch. 894.

² *Hyde v. Trent and Mersey Navigation Company*, 5 T. R. 389.

³ 3 Kent, Comm. 215.

⁴ *Shirwell v. Shaplock*, 2 Chit. Rep. (K. B.) 397.

⁵ *Cargo ex Argos*, L. R. 5 P. C. 134, at 165. As to where goods had been partially landed under a bill of lading and the consignee claimed delivery to him of other goods not landed, but was refused, see *Wilson v. London, &c. Steam Navigation Company*, L. R. 1 C. P. 61 ; *Oliver v. Colven*, 27 W. R. 822 ; The "Energie," L. R. 6 P. C. 306.

be responsible ; but, if the shipowner is prevented from carrying out his share of the discharge by the acts of persons over whom he has no control, the case comes within the same category as the case of non-delivery caused by some physical misfortune over which he has no control.¹

The master cannot rightfully refuse to land the cargo before the freight is paid or secured ; for the consignee has a right after the goods are unloaded to examine them, and see whether they are damaged, and to have any damage ascertained ; and after the discharge the shipowner has the right to detain the cargo in custody until payment or security of the freight.²

2. *Carriers of Passengers by Sea.*

Definition.

"Passengers," says McCulloch,³ "are individuals conveyed for hire from one place to another on board ship." This definition is, however, varied by the Merchant Shipping Act, 1894,⁴ s. 267, which says that the expression passenger shall include any person carried in a ship other than the master and crew, and the owner, his family and servants.⁴

Authority of master.

Since the position of the master of a ship involves such arduous responsibilities, the authority he is empowered to exercise over passengers in his ship is of a kind altogether exceptional ; and the duty of conformity to his directions is most especially incumbent upon them.⁵ The master has absolute control in all that is necessary for the safe and proper conduct of the ship,⁶ and may use force if the safety of the ship or of those on board would justify it.⁷ Thus, if a master were sued for not furnishing good and fresh

¹ Budgett v. Binnington (1891), 1 Q. B. 35. Cp. Castlegate Steamship Company v. Dempsey (1892) 1 Q. B. 54, C. A. 854.

² Abbott, Merchant Ships (13th ed.), 446 ; 3 Kent, Comm. 220, n. (c), where Story, J.'s, judgment in *The Volunteer and Cargo*, 1 Sumn. (U. S. Circ. Ct.) 551, at 577, is dissented from. Freight is payable concurrently with the delivery of the goods, which must be within a reasonable time after arrival : *Paynter v. James*, L. R. 2 C. P. 348, at 355 ; *Duthie v. Hilton*, L. R. 4 C. P. 138. The law as to delivery of goods and lien for freight is consolidated in the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 492-501.

³ Dictionary of Commerce, *sub voc.* See *The Hanna*, L. R. 1 A. & E. 283. The payment of a fare was held necessary to constitute a passenger within the meaning of the compulsory pilotage sections of 17 & 18 Vict. c. 104 : "*The Lion*," L. R. 2 P. C. 525, where the wife and father-in-law of the captain who were on the ship by invitation of the captain and without the privity of the owners, were held not to be passengers within the meaning of the Act, so as to exonerate the owners from liability for damage caused by the pilot's default. See the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 267 and 625.

⁴ 57 & 58 Vict. c. 60, where the whole of the numerous previous enactments are consolidated. See Part III., ss. 267-368. *Ellis v. Pearce*, E. B. & E. 431.

⁵ Dana, *Seaman's Manual* (9th ed.), 132, and c. X. 220-229 ; Abbott, *Merchant Ships* (13th ed.), 211, 212. *Parsons. Law of Shipping*, vol. i. 609-647.

⁶ *King v. Franklin*, 1 F. & F. 360 ; *Noden v. Johnson*, 16 Q. B. 218.

⁷ *Aldworth v. Stewart*, 14 L. T. (N. S.) 862, 4 F. & F. 957 ; *Boyce v. Bayliffe*, 1 Camp. 58, citing *Molloy*, Bk. 2, c. 3 ; 4 Bl. Comm. 36 ; 4 Co. Inst. 134.

provisions, to prove some trifling inconvenience is not enough; it is necessary to shew a real grievance.¹ If the master, without adequate justification, causes the passenger to be disembarked, and uses contemptuous and insulting language to him, an action is maintainable.²

The master is thus clearly liable for purely arbitrary acts not justified by the necessities of discipline, or of providing for the safety of his ship. His duty is well pointed out by Story, J., in *Chamberlain v. Chandler*:³ "In respect to passengers, the case of the master is one of peculiar responsibility and delicacy. Their contract with him is not for mere ship room and personal existence on board; but for reasonable food, comforts, necessities, and kindness. It is a stipulation, not for toleration merely, but for respectful treatment, for that decency of demeanour, which constitutes the charm of social life, for that attention, which mitigates evils without reluctance, and that promptitude which administers aid to distress. In respect to females, it proceeds yet farther; it includes an implied stipulation against general obscenity, that immodesty of approach which borders on lasciviousness, and against that wanton disregard of the feelings which aggravates every evil, and endeavours by the excitement of terror and cool malignancy of conduct to inflict torture upon susceptible minds." "The law is rational and just. It gives compensation for mental sufferings occasioned by acts of wanton injustice, equally whether they operate by way of direct or of consequential injuries. In each case the contract of the passengers for the voyage is in substance violated; and the wrong is to be redressed as a cause of damage. I do not say that every slight aberration from propriety or duty, or that every act of unkindness or passionate folly, is to be visited with punishment; but if the whole course of conduct be oppressive and malicious, if habitual immodesty is accompanied by habitual cruelty, it would be a reproach to the law if it could not award some recompense."

Story, J., in
Chamberlain
v. Chandler.

The passengers, on their part, must render assistance, if necessary, and they are called upon, in cases of peril, whether from the sea or from enemies;⁴ and they are not entitled to claim

¹ *Young v. Fewson*, 8 C. & P. 55; *Prendergast v. Compton*, 8 C. & P. 454; *Jencks v. Coleman*, 2 Sumn. (U. S. Circ. Ct.) 221.

² *Coppin v. Braithwaite*, 8 Jur. 875.

³ *Mason* (U. S.) 242, at 245.

⁴ *Boyce v. Bayliffe*, 1 Camp. 58. In *Newman v. Walters*, 3 B. & P. 612, a passenger was held entitled to sue the owner for salvage. But a passenger is not entitled to salvage if he renders only that ordinary assistance which it is the interest of all persons on board to afford for the purpose of avoiding the common danger: *The Branston*, 2 Hagg. (Adm.) 3 n.; *The Vrede*, Lush. 322, where it is said that even seamen may be entitled to salvage when an abandonment of the ship has put an end to their contract. The law was laid down to the same effect in *The Le Jonet*, L. R. 3 A. & E. 556, affirming, however, the general principle stated by Lord Stowell, in the

salvage for services rendered unless their services are exceptional, as for navigating the ship after the master and crew, or some of them, have left her in peril,¹ or for rescuing the ship after capture by an enemy.²

Where there is an express contract³ the rights of the passenger will of course be determined by it; and whether express or not, the passenger's rights are to be construed with reference to usage.⁴

Duty of
shipowner.

The shipowner is bound to provide reasonable accommodation for his passengers; and a shipowner has been held liable where an accident happened to a passenger through want of means to descend from a berth.⁵

Luggage of
passengers.

The law with regard to the luggage of passengers by sea does not appear to differ from that we have already considered as to the luggage of passengers by land.⁶

Pardee v.
Drew.

In America it has been decided that though steamboat proprietors who are common carriers of passengers for hire are liable for the baggage of passengers, they are only liable for such things as are usually carried by travellers for necessity or personal convenience.⁷ This decision, which was arrived at on the ground "that a reasonable amount of baggage by common usage was deemed to be included in the fare of the passenger," is identical with what has been decided under the provisions about luggage in the English railway Acts.⁸

Master has lien
on the luggage
of passengers.

The master of the ship has a lien on the luggage of the passenger for his passage-money, but not for the clothes he is wearing when about to leave the ship.⁹

Medical man
on board
passenger
ship.

Every emigrant ship¹⁰ must carry a duly qualified medical practitioner rated on the ship's articles, if there are more than

Neptune, 1 Hagg. (Adm.) 227, and was reaffirmed by Dr. Lushington in *The Warrior*, Lush. 476. See *ante*, 1272, note ⁵. *Stilk v. Myrick*, 2 Camp. 317; *Hartley v. Ponsonby*, 7 E. & B. 872; 3 Kent, Comm. 185, 196; *The Two Catharines*, 2 Mason (U. S.) 319.

¹ *The Vrede*, Lush. 322.

² *The Two Friends*, 1 C. Rob. (Adm.) 271.

³ Such a contract is a personal contract, and not cognizable in Admiralty, *Brckett v. Brig Hercules*, Gilpin (U. S. Dist. Ct.) 184; *Adderley v. Cookson*, 2 Camp. 15; *Gillan v. Simpkin*, 4 Camp. 241; *Leman v. Gordon*, 8 C. & P. 392; *Yates v. Duff*, 5 C. & P. 369; *Siordet v. Brodie*, 3 Camp. 253.

⁴ *Hutton v. Warren*, 1 M. & W. 466, at 475.

⁵ *Andrews v. Little*, 3 Times L. R. 544 (C. A.).

⁶ *Ante*, 1215. See *Wilton v. Atlantic Royal Mail Steam Navigation Company*, 10 C. B. N. S. 453; *Taubman v. Pacific Steam Navigation Company*, 26 L. T. (N. S.) 704, which would very probably not be followed in an English Court (*Le Blanche v. London and North-Western Railway Company*, 1 C. P. Div. 286), and certainly not in an American Court (*Railroad Company v. Lockwood*, 17 Wall. (U. S.) 357), is noteworthy for an expression of opinion by Bramwell, B., that the Railway and Canal Traffic Act, 1854, "has been already [1872] the cause of more dishonest transactions than any Act of Parliament."

⁷ *Pardee v. Drew*, 25 Wend. (N. Y.) 459. Cp. *Hawkins v. Hoffman*, 6 Hill (N. Y.) 586, at 589. *Ante*, 1085, and 1226.

⁸ *Macrow v. Great Western Railway Company*, L. R. 6 Q. B. 612. *Ante*, 1216.

⁹ *Wolf v. Summers*, 2 Camp. 631.

¹⁰ Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 268.

fifty steerage passengers on board; and in all cases, where the number of persons on board exceeds three hundred.¹ All proper and necessary medicines must also be provided; of the sufficiency of which the emigration officer at the port of clearance is the judge;² who further has the duty imposed on him of appointing a medical practitioner to inspect and report as to the sufficiency of the medicine and other requisitions in the Act specified; and it is on the certificate of such medical practitioner that the emigration officer is to act.

The position and responsibility of the shipowner with reference to the ship's medical officer, under the Act, was considered in *Allan v. State Steamship Company*.³ A woman passenger having asked for quinine, got calomel, and sued the shipowner for the injury sustained through the doctor's negligence. The liability of the shipowner was, however, negatived, on the ground that, when he has engaged a suitably qualified person as required by law, and has placed in his charge a supply of medicines sufficient in quantity and quality for the purposes required (and this is evidenced by the certificate of the medical practitioner called in at the port of clearance, and the approval of the emigration officer), and has furnished to the qualified person so engaged, a proper place in which to keep the medicines, the shipowner has performed his duty to his passengers, and is not liable for the medical officer's negligence. But the medical officer is liable for his own negligences, and independently of whether his services are gratuitous or remunerated.⁴

The most important regulations with regard to emigrants are statutory, and reference must be accordingly made to the various sections of Part III. of the Merchant Shipping Act, 1894,⁵ to ascertain their rights and liabilities.

A personal assault by the master of a vessel on a passenger on the high seas may form the subject of a suit in Admiralty.⁶

¹ Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 303. Under s. 324 these regulations may be modified by Order in Council.

² Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 300.

³ 132 N. Y. 91, 28 Am. St. R. 556.

⁴ See *post*, 1406, Medical Men.

⁵ 57 & 58 Vict. c. 60.

⁶ *Mulloy v. Backer*, 5 East 316. As to implied assumpsit for passage-money, *The Ruckers* (1801), 4 C. Rob. (Adm.) 73. As to damages to seaman in respect of assaults and ill-treatment by the master, *the Agincourt*, 1 Hagg. (Adm.) 271; *the Lowther Castle*, 1 Hagg. (Adm.) 384; *the Enchantress*, 1 Hagg. (Adm.) 395. In *Watson v. Christie*, 2 B. & P. 224, Lord Eldon, C.J., held that where a beating might be possibly justified on the ground of the necessity of maintaining discipline on board ship, yet such a defence could not be resorted to unless put upon the record in the shape of a special justification; for the master has a right in case of gross misbehaviour, to inflict corporal punishment upon the delinquent mariner. The rules under which this may be done are given in the leading case of *the Agincourt*, *supra*.

CHAPTER V.

COLLISIONS ON WATER.¹

Damage by
collision
defined.

"IN common understanding and as understood in the Court of Admiralty," says Montague Smith, J.,² "damage by collision is damage sustained by a ship from another ship coming in contact with it."

If by this the learned judge intended to convey that damage sustained by a ship from another ship is the sole damage that can be sued on in the Court of Admiralty,³ his inference is corrected by *The Zeta*⁴ in the House of Lords. The conclusion from the decision in which case is, that no ground either on principle or authority exists for holding the Admiralty jurisdiction in the case of damage received by a ship limited to damage received by collision with another vessel. That being so, the term "damage by collision," as used in 31 & 32 Vict. c. 71 s. 3 is not so limited; nor the term "damage to ships whether by collision or otherwise" in 32 & 33 Vict. c. 51 s. 4.⁵

It may accordingly now be taken as settled law that County Courts under the two Acts above mentioned having Admiralty

¹ For a complete treatise on this very technical subject, see Marsden, *Law of Collisions at Sea* (3rd ed.). Collision is also very fully treated by Parsons, *Law of Shipping*, vol. i. 525-598. In Abbott, *Merchant Ships*, there was no chapter on Collisions till one was supplied by Serjeant Shée in his edition, the 10th..

² *Everard v. Kendall*, L. R. 5 C. P. 428, at 432, adopted *Robson v. The Owner of The Kate*, 21 Q. B. D. 13, and cited per Lopes, L.J., *The Zeta* (1892), P. 285, at 291.

³ What is here said has reference to the jurisdiction of the Court of Admiralty apart from the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 10.

⁴ (1893) App. Cas. 468. The various instances of damages that have been sued on in the Court of Admiralty, are collected in the appellant's argument, 471. In *The Theta* (1894), P. 280, Bruce, J., says, at 284: "Damage done by a ship is, I think, applicable only to those cases where, in the words of the Master of the Rolls in *The Vera Cruz* (9 P. Div. 96, at 99), the ship is the 'active cause' of the damage. The same idea was expressed by Bowen, L.J., who said, the damage 'done by a ship means damage done by those in charge of a ship with the ship as the noxious instrument.'"

⁵ The House of Lords held that even had the jurisdiction of the Court of Admiralty been limited as was contended, the terms of the Acts of Parliament above cited would have given to County Courts a wider jurisdiction than that possessed by the old Court of Admiralty. The decision in *The Queen v. The Judge of the City of London Court* (1892), 1 Q. B. 273, holding that the Court of Admiralty had no jurisdiction to entertain an action for negligence against a pilot *in personam*, is unaffected by the decision in *The Zeta* (1893), App. Cas. 468.

jurisdiction may, in the exercise of that jurisdiction, entertain any suit for damage done by a ship and to a ship, whether by collision or otherwise, to the extent of all claims not exceeding £300, without any necessity of shewing that the body receiving or doing the damage shall be a ship.¹

By section 6 of the Admiralty Court Act, 1840,² the jurisdiction of the High Court of Admiralty (now the Admiralty Division) which was always exerted in matters arising on the high seas is extended to cases where a ship is within the body of a county when the services were rendered or damage received or necessities furnished in respect of which the claim sued on is made.

Admiralty Court Act, 1840.

The sea has been often, and not improperly, termed "the common highway of nations"; and the rights and duties of ships traversing the sea with respect to one another do not substantially differ from those incurred by those who carry on a traffic by vehicles on land.³

Sea the common highway of nations.

Liability for injury is accordingly based on negligence. Every person navigating the seas or rivers must use reasonable skill and care to prevent mischief to other vessels.⁴ This duty is, says Maule, J.,⁵ "incident to the possession and control of the vessel." He who is in possession or control may make the vessel fast, or proceed while it is afloat, or remain as long as he pleases if aground; of course subject to navigation rules.

Liability based on negligence.

In the case just referred to, *Brown v. Mallett*,⁶ the liability of the person having the possession and control of a vessel, which sinks so as to obstruct a public navigable river, was considered with reference to other vessels navigating. When the vessel sunk the owner abandoned her. The Court held (Maule, J., giving the judgment) that as the liability of the original owner did not continue where the possession and control had been transferred, so where they had been not transferred, but aban-

Liability where vessel has been abandoned.

Maule, J.'s judgment in *Brown v. Mallett*.

¹ In consequence of the provision of the Judicature Act, 1873 (36 & 37 Vict. c. 66), the consideration of the jurisdiction of the Old Court of Admiralty is only important as it affects the jurisdiction of County Courts with Admiralty jurisdiction.

² 3 & 4 Vict. c. 65. Cp. *The Mecca* (1895), P. 95. See an article by Dana, On the History of Admiralty Jurisdiction, *Am. Law Rev.* vol. v., 581; also, on the same subject, see 1 Kent, Comm. (12th ed.) 354-380. In the United States the Admiralty jurisdiction of the Supreme Court extends over all the great lakes and the rivers so far as they are navigable: *The Genesee Chief*, 12 How. (U. S.) 443; *The Hine*, 4 Wall. (U. S.) 555, at 569. As to what rivers are navigable, *The Daniel Ball*, 10 Wall. (U. S.) 557, at 563.

³ *River Wear Commissioners v. Adamson*, 2 App. Cas. 743, per Lord Blackburn, at 767. *Ante*, 651. See, too, *Fletcher v. Rylands*, L. R. 1 Ex. 265, at 286; *The Khedive*, 5 App. Cas. 876, at 890; *Cayzer v. Carron Company*, 9 App. Cas. 873, at 882.

⁴ *Brown v. Mallett*, 5 C. B. 599.

⁵ *L. c.* 5 C. B. 599, at 617.

⁶ 5 C. B. 599, followed in *Hancock v. York, Newcastle, and Berwick Railway Company*, 10 C. B. 348. In *Jolliffe v. Wallasey Local Board*, L. R. 9 C. P. 62, the anchors were part of the permanent works of the defendants, and constituted a concealed danger when they omitted to buoy them in a sufficient manner.

doned: "We do not think that the duty *always* arises and continues for an indefinite time. Where the navigation of a river has become obstructed by a vessel which has sunk and been lost to the owner, without any fault of his, the public inconvenience of the obstruction is one in respect of which the owner differs from the rest of the public only in having sustained a private calamity, in addition to his share of a public inconvenience; and this difference does not appear to be any reason for throwing on him the cost of remedying or mitigating the evil."¹

White v. Crisp. In *White v. Crisp*,² Alderson, B., speaking of the judgment of Maule, J., in *Brown v. Mallett*, said:³ "From the principles there laid down by him (which, however, were not all absolutely necessary for the decision of that individual case) we do not disagree at all. He there lays it down thus—that it is the duty of a person using a navigable river with a vessel of which he is possessed and has the control and management, to use reasonable skill and care to prevent mischief to others; and he adds that his liability is the same whether his vessel be in motion or stationary, floating or aground, under water or above it. For in all these circumstances, the vessel may continue to be in his possession and under his management and control. This duty arises out of the possession and control of the vessel being in him.

¹ 5 C. B. at 618. In *The King v. Watts*, 2 Esp. (N. P.) 675, Lord Kenyon held that the owner of a ship sunk in the Thames without default was not liable to an indictment for not removing the obstruction. *Vivian v. Mersey Docks and Harbour Board*, L. R. 5 C. P. 19, is a case on the construction of The Mersey Dock Acts Consolidation Act, 1858 (21 & 22 Vict. c. xcii.), s. 59. Under 10 & 11 Vict. c. 27 (The Harbours Act, 1847), s. 56, the "owner" of a wreck becoming an obstruction to any harbour, is to repay the harbour master the expense of removing it. *Earl of Eglinton v. Norman*, 46 L. J. Q. B. 557, decided that "owner" refers to the owner at the time the wreck became an obstruction. This decision was overruled in the *H. of L.* in *Arrow Shipping Company v. Tyne Improvement Commissioners*, The "Crystal," (1894) App. Cas. 508. The appellants had abandoned their vessel as derelict on the high seas without any intention of resuming possession or ownership. They also gave notice of abandonment to the underwriters. The House of Lords on these facts held that "where the owner of the vessel which is wrecked gives the harbour authority to understand that he retains his right of property in the wreck, and they remove it so as to be in a position to return it to him substantially in the same condition in which it was when they commenced operations, they can charge him, I think, with the cost of removal, though the cost may exceed the value of the thing removed. Where he tells them plainly that he has abandoned the wreck, they may deal with it as they please, without regard to him; but they cannot make him personally liable for their expenditure. The defects, such as they were, in sec. 56 are remedied by the Removal of Wrecks Act, 1877 (40 & 41 Vict. c. 16). Under that Act the harbour authorities may destroy the wreck if they think fit, although there be an owner claiming an interest in it, and they may do the work of destruction without regard to the owner's interest": per Lord Macnaghten, at 533. The "owner" is, however, *personally* liable for the repayment of the expenses of removal. See now the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 518-537.

² 10 Ex. 312. "It is a rule of maritime law from the earliest times 'that if a ship run foul of an anchor left without a buoy, the person who placed it there shall respond in damages': Philadelphia, Wilmington, and Baltimore Railroad Company v. Philadelphia and Havre de Grace Steam Towboat Company, 23 How. (U. S.) 209, at 216.

³ 10 Ex. at 320.

And it is clearly also laid down in the same judgment that this liability may be transferred with the transfer of the possession and control to another person. And further, that on the abandonment of such possession, control, and management, the liability also ceases." In that case the facts shewed that at the time of the injury to the plaintiffs' vessel the defendants, to whom the sunken ship had been transferred, had exercised control. The conclusion is that it was the duty of the owner, so long as he was in possession, to take precautions to prevent injury.¹

In *The Douglas*,² a ship had sunk in the Thames in consequence of a collision with another ship through her own negligence; subsequently a third ship had come into collision with the sunk ship as she lay in mid-channel with one of her masts above water. In an action by the owner of the third ship it was contended that it was the duty of the owners of the sunk vessel to warn approaching vessels of the wreck, and as no such warning was given, the owners of the sunk ship were responsible for the damage. This contention was sustained in the Admiralty Division by Sir Robert Phillimore, on the authority of a *dictum* of Maule, J.'s, in *Brown v. Mallett*³—"it is the duty of a person using a public navigable river with a vessel of which he is possessed, and has the control and management, to use reasonable skill and care to prevent mischief to others." This liability "is the same whether his vessel be in motion or stationary, floating or aground, under water or above it."⁴ There was a finding of fact that the sunk ship "*The Douglas* was not abandoned by her master and crew."⁵

Dictum of
Maule, J., in
Brown v.
Mallett.

In the Court of Appeal Sir Robert Phillimore's decision was reversed, because "there was no negligence of which the plaintiff can take advantage." "I incline to agree," said Brett, L.J.,⁶ "that if the owners of a wreck abandon it their liability ceases. But here the defendants claim the ownership of the wreck. It may be that the defendants did not hear of the accident for some time; as to those employed by them, the captain is *prima facie* to act; it is for the plaintiff to prove that there was negligence." To the argument, that the reason of *The Douglas* being in the position where she did the injury was her negligent collision

Brett, L.J.'s
judgment.

¹ These cases are discussed in *Taylor v. Atlantic Mutual Insurance Company*, 37 N. Y. 275, by Davies, C.J., and approved as "eminently" sound. See *Harmond v. Pearson*, 1 Camp. 515, as to what was the proper mode of giving notice of a sunken barge. Cp. *White v. Phillips*, 33 L. J. C. P. 33.

² 7 P. Div. 151, noticed in *Dormont v. Furness Railway Company*, 11 Q. B. D. 496, 501. See *The Ettrick*, 6 P. Div. 127.

³ 5 C. B. 599, at 616.

⁵ 7 P. D. at 155.

⁴ *Ibid.*

⁶ L. c. at 160.

with the first ship, therefore the primary negligence affected all her future conduct, the answer of the Lord Justice was:¹ "To wilfully scuttle a ship in a tide-way so as to cause an obstruction may possibly be an indictable offence; but what the defendants did was no indictable offence. Their own ship sank. It seems to me clear that no greater liability can exist against the defendants than if their steamship had sunk without negligence." The decision seems plain, and inevitable upon well-recognized principles; since "traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk;"² subject to the liability to which they have the user; while negligence to be actionable must be *incuria dans locum injuriæ*.³ The only relevant inquiry left would be as to the fact of whether there was default on the part of the defendants after the ship had settled into the river. The Court found there was not, and entered judgment for the defendants.

The cases
considered.

Two of the judges seemed to reflect on *Brown v. Mallett*⁴ and *White v. Crisp*.⁵ Lord Coleridge, C.J., was of opinion that "these cases may be good law,"⁶ and Brett, L.J., said,⁷ "I say nothing" as to them "except that they were decided on demurrer." Notwithstanding this, the *dictum* on which Sir Robert Phillimore based his judgment appears quite sufficient to comprehend the judgment in *The Douglas* without any inconsistency. Even though it is the duty of a person using a navigable river, with a vessel either "under water or above it," to use "reasonable skill and care,"⁸ the *onus* is on the plaintiff to shew absence of skill and care in the circumstances of traffic on a highway. This *onus*, according to Brett, L.J., was not discharged in *The Douglas* by the facts proved by the plaintiff, and thus *The Douglas* would be only an instance of the rule laid down in *Brown v. Mallett*. In *Brown v. Mallett* it might be made to appear that while there is possession and control there is liability; but the decision only lays down this where there is a collision "from the improper manner in which one of the two [vessels in collision] is managed, the owner of the vessel properly managed is entitled to recover damages from the owner of that which was improperly

¹ *L. c.* at 160.

² Per Blackburn, J., *Fletcher v. Rylands*, *L. R.* 1 Ex. 265, at 286.

³ Per Lord Cairns, *Metropolitan Railway Company v. Jackson*, 3 App. Cas. 193, at 198. See per Brett, L.J., in *The Margaret*, 6 P. Div. 76, at 79: "In order to establish a cause of action, the Court must find, not only that there was a collision, and that it was the result of the negligence of the defendants, but that some damage was done; these being found, the liability is made out and the cause of action is established."

⁴ 5 C. B. 599.

⁵ 10 Ex. 312.

⁶ 7 P. Div. at 159.

⁷ *L. c.* at 160.

⁸ Per Alderson, B., *White v. Crisp*, 10 Ex. at 321.

managed.¹” The general law, as we have seen, requires proof of this improper management in order to found liability. The expression used in *Brown v. Mallett*, “We think that it cannot be universally affirmed, that, in all cases where the possession and control of the owners have ceased, such a duty arises,”² is of extreme cautiousness, and is even consistent with the duty as a practical matter never arising; since the only case that the Court was called to give judgment on was a case where the duty did not arise; and with the propositions necessary to establish the rule outside the scope of the actual case before them the Court thus carefully refrained from committing themselves. Possession and control by no means *always* import liability, though they do where there is negligence.³

The result of the cases was summed up in *The Utopia*,⁴ a case in the Privy Council very similar to *The Douglas*, as follows:⁵ “The owner of a ship sunk whether by his default or not (wilful misconduct probably giving rise to different considerations) has not, if he abandon the possession and control of her, any responsibility, either to remove her or to protect other vessels from coming into collision with her. It is equally true that so long as, and so far as, possession, management, and control of the wreck be not abandoned or properly transferred, there remains on the owners an obligation in regard to the protection of other vessels from receiving injury from her. But in order to fix the owners of a wreck with liability two things must be shewn, first, that in regard to the particular matters in respect of which default is alleged, the control of the vessel is in them, that is to say, has not been abandoned or legitimately transferred, and secondly, that they have in the discharge of their legal duty been guilty of wilful misconduct or neglect.” In the case of *The Utopia* it was held that the liability of the shipowners was diverted by reason of the undertaking of the port authorities to safeguard the wreck.

In navigating harbours and roadsteads accidents may often happen from the mere disturbance of the water caused in certain circumstances by the movements of huge vessels which may sometimes swamp small craft. There is therefore a duty upon those navigating large vessels so to moderate the force at their

¹ 5 C. B. at 616.

² L. c. at 618.

³ In *The Douglas*, 7 P. Div. 151, at 160, Cotton, L.J., held that under the Removal of Wrecks Act, 1877 (40 & 41 Vict. c. 16), s. 4, by which a harbour master has power to put up lights, it becomes his duty to remove a dangerous obstruction. See now the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 530. The American law as to abandoning a sunken vessel is discussed and stated by Agnew, J., in *Winpenny v. Philadelphia*, 65 Pa. St. 135.

⁴ (1893) App. Cas. 492.

⁵ L. c. at 498.

Large vessels
swamping
small craft.

command as not to be injurious to small vessels using the waters. This was pointed out and insisted on in the American case the "Nevada,"¹ where an ocean steamer starting from a crowded slip, the motion of her propeller made such a tumult in the water as to cause a canal boat to break her fastenings and, swinging round, to come into collision with the propeller, whereby she was sunk. There was no look-out on the steamer, else the accident might have been prevented. The steamer was held liable; but it was besides pointed out in the judgment, that such a vessel as the one proceeded against is "justly required to observe extraordinary care and watchfulness when surrounded by feebler craft in a crowded harbour,"² and further than this, that, in some circumstances and within a limited space, it may even be required "to dispense with the use of its ordinary means of locomotion, and resort to the employment of towage or other safe and quiet means of changing its position and effecting its necessary movements" as the alternative to jeopardizing less substantial craft.

Judgment of
Lord Stowell
in the
Woodrop Sims.
Four possi-
bilities of
collision.

In the Woodrop Sims³ Lord Stowell states four possibilities under which a collision may occur.

First, a collision may occur without blame to either party; as where the loss is occasioned by a storm or any other *vis major*. The misfortune then lies on the party on whom it happens to light.⁴

Secondly, a collision may occur where both parties are to blame; as where there has been a want of due diligence or of skill on both sides.⁵ The rule of law then is that the loss must be apportioned between them.⁶

Thirdly, a collision may occur by the misconduct of the suffering party only;⁷ when the sufferer must bear his own burthen.

Lastly, a collision may occur through the fault of the ship

¹ 106 U. S. (16 Otto) 154.

² L. c. at 159.

³ 2 Dodson (Adm. Cas.) 83, at 85. See Bell, Comm. (7th ed.), 626. See a consideration of the liability "for any loss, damage, or injury by collision" from an American standpoint, The Atlas, 93 U. S. (3 Otto) 302.

⁴ Stainbach v. Rae, 14 How. (U. S.) 532. As to inevitable accident, The Naples, 11 P. D. 124. The authorities are set out 3 Kent, Comm. 231 *et seq.* *Post*, 1324.

⁵ 3 Kent, Comm. 231, speaks of this rule as *rusticum judicium*, adopting the expression of Cleirac, Us et Coutumes de la Mer, 56, (ed. 1671), *judicium rusticorum*. But, says Valin, as translated or, more accurately, summarized in Abbott, Merchant Ships (13th ed.), 829, there is "no better means of making the masters of small vessels, which are liable to be injured by the slightest shock, attentive to avoid collision, than to keep the fear of paying for half the damage constantly before their eyes. And if it be said that it would have been a shorter and more simple mode of adjustment to let each party bear the loss he has sustained as arising from *casus fortuitus*, the answer is, that then the masters of large vessels would make light of collision with those of smaller burthen. Upon the whole, therefore, no rule is so just as that of equal partition." Valin, Ordonnance de la Marine, liv. 3, tit. 7, art. 10, at 179.

⁶ Per Lord Selborne, C., The Khedive, 7 App. Cas. 795, at 800.

⁷ Strout v. Foster, 1 How. (U. S.) 89; The Massachusetts, 1 W. Rob. (Adm.) 371.

which runs the other down. Then the injured party is entitled to an entire compensation from the other.¹

In *Cayzer v. Carron Company*,² Lord Blackburn affirms the identity of the common law with the Admiralty in the first, second, and fourth of these cases, and points out that in the third the rule of the common law is that, as each occasioned the accident, neither shall recover, and the loss shall lie where it falls, as against the Admiralty rule that if both contributed to the loss it shall be brought into hotchpot and divided; he continues thus: "Until the case of *Hay v. Le Neve*,³ which has been referred to in the argument, there was a question in the Admiralty Court whether you were not to apportion it according to the degree in which they were to blame; but now it is, I think, quite settled, and there is no dispute about it, that the rule of the Admiralty is, that if there is blame causing the accident on both sides they are to divide the loss equally, just as the rule of law is that if there is blame causing the accident on both sides, however small that blame may be on one side, the loss lies where it falls."

Lord Blackburn in *Cayzer v. Carron Company*.

In America the law has been clearly laid down in the "*Clara*" to the same effect. Where the fault is wholly on one side, the party in fault must bear his own loss and compensate the other party, if such party has sustained any damage. If neither be in fault, neither is entitled to compensation from the other. If both are in fault, the damages will be divided.⁴

Law in America.

All questions of collision are questions *communis juris*,⁵ and therefore, where in an action *in personam* brought by the owners of a British vessel against the owners of a Spanish vessel, the defendants pleaded that they were Spanish subjects, and that if there was any negligence in this navigation of their ship it was negligence for which the master and crew alone were liable by the law of Spain, they were held to disclose no defence⁷ in law.

Questions of collision are *communis juris*.

Effect of the Judicature Act.

By the Supreme Court of Judicature Act, 1873,⁸ s. 25, sub-s. 9, where the rules of the Admiralty Court and the common law courts are different, the rule of the Admiralty is to be followed.

¹ This passage was cited with approval by Lord Gifford in the House of Lords in *Hay v. Le Neve*, 2 Shaw (H. L. Sc.) 395.

² 9 App. Cas. 873, at 881.

³ 2 Shaw (H. L. Sc.) 395. This case is considered and treated in *The Khedive*, 7 App. Cas. 795, at 804, 817.

⁴ 102 U. S. (12 Otto) 200; Parsons, Law of Shipping, vol. i. 525 *et seq.*

⁵ A rule in the United States, not confined to ships, but extended to persons, in *The Max Morris*, 137 U. S. (30 Davis) 1. See this case considered, *ante*, 207.

⁶ *The Johann Friederich*, 1 W. Rob. (Adm.) 35, at 37; "but," Dr. Lushington adds, "in cases of mariners' wages, whoever engages voluntarily to serve on board a foreign ship, necessarily undertakes to be bound by the law of the country to which such ship belongs."

⁷ *The Leon*, 6 P. D. 148; *The Wild Ranger*, Lush. 553; *The Zollverein*, Swa. (Adm.) 96.

⁸ 36 & 37 Vict. c. 66.

So that in the case of a collision between two ships¹ where there has been a want of due diligence or of skill on both sides, whether the action is brought in the Admiralty Division or in the Queen's Bench Division, in both cases the loss is to be divided equally.

Caution.

One caution must be observed. The actual transgression imputed must be ascertained to have been in fact to some extent—to what extent is immaterial²—the cause of the accident. This is matter of proof. The question of *onus* then becomes of importance.

The
"Fenham."

The "Fenham"³ was the case of a collision between a steamship and a sailing vessel where the steamship was in fault. It was proved, however, that the sailing vessel had not complied with certain Admiralty regulations about lights; and it was contended that this made the negligence contributory. Lord Romilly, delivering the judgment of the Privy Council, considered that the omission to exhibit lights might be immaterial if it were shewn that the absence of lights did not in any respect conduce to the collision. He held further that, proof having been given of the absence of regulation lights, the burden lay on the ship so in default to shew that this default was not the cause of the collision.

Lord Blackburn
in *Cayzer v. Carron*
Company.

Lord Blackburn, in *Cayzer v. Carron Company*,⁴ though not dissenting from this rule as applied in the case of *The Fenham*, did not consider it applied in the case then before the House of Lords, where the contributory negligence was non-observance of a regulation about rate of speed.

Breach of rules
of navigation
imports
liability.

There is another class of cases where the rule is a rule by statute, and it is provided that a breach of the rules of naviga-

¹ By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 742, "ship" includes every description of vessel used in navigation not propelled by oars. *The Andalusian*, 3 P. D. 182. *Ex parte Ferguson and Hutchinson*, L. R. 6 Q. B. 280, per Blackburn, J.; *The Mac*, 7 P. D. 126. The Merchant Shipping Act, 1894, ss. 2, 4, and 24, only applies to British ships, but not so the Bills of Sale Acts, *Union Bank of London v. Lenanton*, 3 C. P. D. 243; *Gapp v. Bond*, 19 Q. B. D. 200; *The Spirit of the Ocean*, 34 L. J. (Adm.) 74. What passes to a mortgagee under the word "ship" is considered, *Coltman v. Chamberlain*, 25 Q. B. D. 328. By 24 Vict. c. 10, s. 2, "ship" means "any description of vessel used in navigation not propelled by oars." A "dumb barge" is not a vessel within 27 & 28 Vict. c. clxxviii., though it is such within the Harbours, Docks and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), s. 3: *Hedges v. London and St. Katharine Docks Company*, 16 Q. B. D. 597. See also *Sewell v. British Columbia Towing and Transportation Company*, 9 Can. S. C. R. 527, at 550. In *Ex parte Ferguson and Hutchinson*, L. R. 6 Q. B. 280, at 291, Blackburn, J., is reported thus: "The argument against the proposition is one which I have heard very frequently—viz., where an Act says certain words shall include a certain thing, that the words must apply exclusively to that which they are to include. That is not so; the definition given of a 'ship' is in order that 'ship' may have a more extensive meaning." In that case a "coble" was held to be a ship. Blackburn, J.'s, principle of construction is also explained by Lord Selborne, C., in *Robinson v. Barton Eccles Local Board*, 8 App. Cas. 798, at 801. *Mayor, &c. of Southport v. Morris* (1893), 1 Q. B. 359, considers what is "a vessel used in navigation." As to Admiralty jurisdiction, *The Zeta* (1893), App. Cas. 468. *Ante*, 1312.

² *Dowell v. General Steam Navigation Company*, 5 E. & B. 195.

³ L. R. 3 P. C. 212.

⁴ 9 App. Cas. 873, at 883.

tion shall in itself be deemed evidence of negligence.¹ Even here, though the party guilty of infringement is deemed to be blameworthy, he may still exonerate himself by shewing that the infringement could not possibly have contributed to the collision.²

In *The Arklow*,³ Sir James Hannen, delivering the judgment of the Privy Council in the case of a non-statutory regulation, stated the principle applicable to be "that if the absence of due observance of the rule can by any possibility have contributed to the accident, then that the party in default cannot be excused."⁴ To this, as we have just seen, there must be a rider, or rather, perhaps, the expression of a condition implied in the rule, that the party infringing is not to be shut out from shewing that the infringement could not have contributed to the injury; failing this, he is to be held liable; and, in addition, a limitation of the phrase "any possibility"⁵ to a possibility working out in the normal course of things. The cases then come out quite consistently. The violation of a regulation, *e.g.*, the absence of lights,⁶ which suggests a contributing cause to the accident, throws the *onus* on the plaintiff.⁷

The Arklow.

A rider to the rule in *The Arklow.*

The rule stated.

If the breach is the breach of a regulation which in the natural sequence of cause and effect would not conduce to the accident,⁸ the *onus* of proof is unaffected. If the breach is by statute deemed blameworthy, the *onus* of proof is on the plaintiff to disprove such alleged breach, whether it would or would not in the natural sequence of cause and effect have conduced to the accident.⁹ The effect, then, of the breach of an Admiralty regulation is to bring under the head of negligence those cases which, but for the regulation, are equally consistent with the absence of negligence; leaving unaffected those cases where the facts negative the presumption of negligence except in the case of statutory enactment.

¹ *The Khedive*, 5 App. Cas. 876; Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 419; *The Love-Bird*, 6 P. D. 80; *The Pennsylvania*, 23 L. T. (N. S.) 55; *The Steamship Westphalia*, 24 L. T. (N. S.) 75. As to the effect of section 17 of 36 & 37 Vict. c. 85, re-enacted as s. 419 of 57 & 58 Vict. c. 60, see per Lord Blackburn, *The Khedive*, 5 App. Cas. 876, at 892; *The Emmy Haase*, 9 P. D. 81.

² *The Fanny M. Carvill*, reported as a note in 13 App. Cas. 455, approved in *The Hochung*, 7 App. Cas. 512; *The Englishman*, 3 P. D. 18, where there was failure to comply with the regulations, but no possibility of the collision occurring therefrom. In *The Mary Hounsell*, 4 P. D. 204, infringement was deemed to shew fault; *The Hermod*, 62 L. T. 670, and see *post*, 1324.

³ 9 App. Cas. 136.

⁴ L. C. at 139.

⁵ *The Breadalbane*, 7 P. D. 186; cp. *The Vera Cruz*, 9 P. D. 88; *The Khedive*, 5 App. Cas. 876, per Lord Watson, at 901.

⁶ *The Fenham*, L. R. 3 P. C. 212.

⁷ Per Sir James Colville, *The Velasquez*, L. R. 1 P. C. 494, at 499.

⁸ *Cayzer v. Carron Company*, 9 App. Cas. 873.

⁹ *The Khedive*, 5 App. Cas. 876. In *The Pennsylvania*, 19 Wall. (U. S.) 125, it was laid down that where there has been a positive breach of a statute, it must be shown, not merely that it probably did not contribute to the accident, "but that certainly it did not." In the case in question this was apparently impossible, and so the liability was fixed. Cp. *The Chilian*, 4 Mar. Law Cas. N. S. 473. In *The Benares*, 9 P. Div. 16, the

Nautical
negligence
defined in
The Dundee

In *The Dundee*¹ Lord Stowell defined nautical negligence as "a want of that attention and vigilance which is due to the security of other vessels that are navigating the same seas, and which, if so far neglected as to become, however unintentionally, the cause of damage of any extent to such vessels, the maritime law considers as a dereliction of bounden duty, entitling the sufferer to reparation in damages."

Rule of
diligence.

The "attention and vigilance" necessary is not "extraordinary skill or extraordinary diligence, but that degree of skill and that degree of diligence which is generally to be found in persons who discharge their duty;"² or, to quote Lord Blackburn,³ "to take reasonable care and to use reasonable skill to prevent it [the ship] from doing injury." Reasonable skill is not a fixed quantity that is to be applied in all circumstances, but a variable quantity, increasing with the need. Thus, in *The George Roper*,⁴ the case of a collision occurring while launching a vessel, Brett, J., cited the judgment in *The Andalusian*⁵ as follows: "The law throws upon those who launch a vessel the obligation of doing so with the utmost precaution, and giving such a notice as is reasonable and sufficient to prevent any injury happening from the launch, and, moreover, the burden of shewing that every reasonable precaution has been taken and every reasonable notice given, lies upon her and those managing the launch." He subsequently defines "reasonable precaution" as being, "in fact, the utmost precaution under such circumstances."

Reasonable
skill a relative
term.

Common law
rule of negli-
gence applies.

There is no essential difference between negligence at common law and negligence by the rules of the Admiralty; if a rule of common sense "what may be called the common law" is transgressed, liability attaches, though no Admiralty rule has been made in the matter.⁶

Perilous
alternatives.

The principle that, a person who causes another to be so placed by his fault, as to constrain him to choose between perilous alternatives, thereby renders himself liable for those consequences,⁷ is of frequent application in Admiralty cases, and must

Court of Appeal distinguished *The Khedive*, and held that "it must be shewn to the satisfaction of the Court, if there has been an infringement, that the circumstances of the case made a departure from the regulations necessary. It is not enough, perhaps, to shew that what the captain did was reasonable and advisable; it must be shewn to be necessary." Where a collision is inevitable from the first, the regulations do not apply: *The Buckhurst*, 6 P. D. 152.

¹ 1 Hagg. (Adm.) 109, at 120.

² Per Dr. Lushington, *The Thomas Powell v. The Cuba*, 2 Mar. Law Cas. 344.

³ *The Khedive*, 5 App. Cas. 876, at 890. Lord Blackburn adds: "A man may not do the right thing, nay may even do the wrong thing, and yet not be guilty of neglect of his duty, which is not absolutely to do right at all events, but only to take reasonable care and use reasonable skill."

⁴ 8 P. D. 119.

⁵ 2 P. D. 231.

⁶ Per Lord Blackburn, *Cayzer v. Carron Company*, 9 App. Cas. 873, at 880.

⁷ *Jones v. Boyce*, 1 Stark. (N. P.) 493, at 495.

be taken as limiting the rule just mentioned—of reasonable skill in the mariner; since, if one is suddenly jeopardized by the fault of another, that other is responsible for the consequences of the action of the imperilled person in the peril in which he has placed him.¹ And “any Court,” it has been laid down,² “ought to make the very greatest allowance for a captain or pilot suddenly put into such difficult circumstances; and the Court ought not, in fairness and justice to him, to require perfect nerve and presence of mind enabling him to do the best thing possible.” “With this,” said Lord Herschell,³ “I entirely agree, though, of course, the application of the principle laid down must vary according to the circumstances.” And in the same case Lord Morris observed: “In my opinion, large allowance should be made for sudden consideration whether directory rules should be disobeyed in order to avoid collision, and when such collision is caused by the misconduct of the parties complaining, there should, in my opinion, be very clear proof of contributing negligence.”

Rule approved
by Lord
Herschell and
by Lord Morris.

In America the same rule has been laid down, though the expression is different. “If,” it is said,⁴ “one vessel is brought into immediate jeopardy by the fault of another, the fact that an order other than that which was given might have been more fortunate will not prevent the recovery of full damages.”

American rule
stated.

The imminency and the nature of the peril are alike to be taken into account in estimating the amount of allowance that is

Imminency
and nature of
the peril to be
taken into
account.

¹ *Kissam v. The Albert*, cited *Parsons, Law of Shipping*, vol. i. 533, where a vessel was thrown against another vessel by the swell caused by a passing steamer, and was held not liable, though she ripped up the timbers of the vessel through carrying her anchor in a way prohibited by the harbour regulations of the port. See, further, *The Sisters*, 1 P. D. 117; *The Industrie*, L. R. 3 A. & E. 303; *The Hibernia*, 31 L. T. (N. S.) 805; *The Marpesia*, L. R. 4 P. C. 212; *The Adalia*, 22 L. T. (N. S.) 74; *The C. M. Palmer and The Larnax*, 2 Mar. Law. Cas. N. S. 94.

² Per Lord Esher, M.R., in *The Bywell Castle*, 4 P. Div. 219, at 226. Cp. *The Utopia* (1893), App. Cas. 492. In the *Agra and Elizabeth Jenkins*, L. R. 1 P. C. 501, at 504, it is said, “if a ship bound to keep her course under the 18th rule justifies her departure from that rule under the words of the 19th rule, she takes upon herself the obligation of shewing both that her departure was at the time it took place necessary, in order to avoid immediate danger, and also that the course adopted by her was reasonably calculated to avoid that danger.” The “*Jesmond*” and the “*Earl of Elgin*,” L. R. 4 P. C. 1; *The Rhondda*, 8 App. Cas. 549; *The Servia*, 149 U. S. (42 Davis) 144; *The “Thorsa,”* 20 *Rettie* 876, affd. (1894) App. Cas. 116.

³ *The Tasmania*, 15 App. Cas. 223, at 226.

⁴ *L. c.* at 238.

⁵ *The Maggie J. Smith*, 123 U. S. (16 Davis) 349, at 355; see also *The Elizabeth Jones*, 112 U. S. (5 Davis) 514; and *The Blue Jacket*, 144 U. S. (37 Davis) 371, where, at 394, distinguishing the earlier case of *The Manitoba*, 122 U. S. (15 Davis) 97, it is said, “in the former [case] the question was between two steam vessels, while in the latter, it is between a steam vessel and a sailing vessel. In the case of *The Manitoba*, the courses of the two steam vessels were not such as to make it the duty of the one more than of the other to avoid the other, or to make it the duty of the one rather than of the other to keep her course; and there was, in regard to the courses of both the steam vessels, such risk of collision that the obligation was upon both to slacken speed, or, if necessary, stop the reverse. But in the present case the duty was wholly on the ship to keep her course, and wholly on the tug to keep out of the way of the ship.” For the law in Scotland, see *Hine Brothers v. Clyde Trustees*, 15 *Rettie* 498.

James, L.J.'s,
illustration in
The Khedive.

to be made for departing from the right course in a critical position. The law is well explained by Lord Blackburn, adopting an illustration of James, L.J., in *The Khedive*,¹ as follows:² "I agree that when a man is suddenly and without warning thrown into a critical position, due allowance should be made for this, but not too much. If, to take the example Lord Justice James gives, the driver of a van cracking his whip makes the horses of a carriage suddenly unmanageable, the fact that the driver of the carriage pulled the wrong rein would be much less cogent evidence of want of reasonable skill or of reasonable care on his part, than if he did the same thing when driving along in the ordinary way, but it would still be evidence."³

But it has been held in the Privy Council that there is no power to absolve a vessel that infringes the regulations for preventing collisions at sea from the consequences prescribed by statute unless the plea of necessity is made out. The effect of this rule is that, where a vessel, which is navigated with reckless negligence by an ignorant and incompetent crew, comes into collision with another vessel, whose only fault is not slackening speed in face of the irregularities of the oncoming vessel, such other vessel cannot be absolved from the statutory penalties.⁴

Inevitable
accident.

Neither ship is liable where the damage has arisen from inevitable accident.⁵

"Inevitable accident" has been defined:⁶ "Where one vessel, doing a lawful act, without any intention of harm, and using proper precautions to prevent danger, unfortunately happens to run into another vessel." To constitute an inevitable accident,⁷ "it was necessary that the occurrence should have taken place in such a manner as not to have been capable of being prevented by ordinary skill and ordinary diligence. We were not to expect extraordinary skill or extraordinary diligence, but that degree of skill and that degree of diligence which is generally to be found in persons who discharge their duty."⁸ In *The "Marpesia,"*⁹ the definition is something "done or omitted to be done which a

¹ 5 App. Cas. 876, at 889.

² *L. c.* at 891.

³ *Cp. The Bywell Castle*, 4 P. Div. 219, where Brett, L.J., thus sums up the rule at 226: "The captains of ships are bound to shew such skill as persons of their position with ordinary nerve ought to shew under the circumstances."

⁴ *The Arratoon Aparcar*, 15 App. Cas. 37.

⁵ *Ante*, 1318; *The Woodrop-Sims*, 2 Dodson (Adm. Cas.) 83, at 85; *Abbott, Merchant Ships* (13th ed.), 825.

⁶ *Per Dr. Lushington, The Europa*, 14 Jur. 627, at 629.

⁷ *The Thomas Powell v. The Cuba*, 2 Mar. Law Cas. 344; *Lack v. Seward*, 4. C & P. 106.

⁸ *Adopted in Fawkes v. Poulson*, 8 Times L. R. 725 (C. A.).

⁹ *L. R.* 4 P. C. 212, at 220, where, also, the definition in *The Virgil*, 2 W. Rob. (Adm.) 205 is cited. The definition in *The "Marpesia"* was adopted by Fry, L.J., in *The Merchant Prince* (1892), F. 179, at 190.

person exercising ordinary care, caution and maritime skill, in the circumstances, either would not have done or would not have left undone, as the case may be."

It appears, accordingly, that the prominent consideration in these cases is not the inevitability of the accident, viewed from the point of the actual motive power that caused it, so much as whether "ordinary care and ordinary skill" being exerted could have prevented it; and that not by reference merely to the moment of the occurrence, but to any earlier stage in which the adoption of measures reasonably to have been counted on would have rendered the occurrence less probable.¹

A collision is said to occur by inevitable accident when both parties have used every means in their power with adequate nautical skill and due care and caution to prevent its occurrence, and have been unable to do so.²

In *The Schwan—The Albano*,³ Lord Esher, M.R., wished to depart from the definitions of "inevitable accident" above cited, and to hold, on the authority of *The Annot Lyle*⁴ and *The Indus*,⁵ that the true definition is the happening of something over which the injurious person "had no control, and the effect of which could not have been avoided by the greatest care and skill."⁶ If this were so, a curious state of things would arise. To render a defendant ship liable, negligence—that is, want of reasonable care and skill—must be proved by the plaintiff. If, however, the defendant were to set up "inevitable accident" as his defence, he would thereby take on himself the obligation of proving considerably greater diligence than if he refrained, and contented himself with

"Ordinary care and ordinary skill" the test.

Lord Esher, M.R.'s contention in *The Schwan*.

¹ *The Virgil*, 2 W. Rob. (Adm.) 201; *The Uhla*, 37 L. J. Adm. 16, n.; *The Hibernia*, 4 Jur. (N. S.) 1244.

² *The Lochlibo*, 3 W. Rob. (Adm.) 310; *The Calcutta*, 21 L. T. (N. S.) 768; *The "Marpesia"*, L. R. 4 P. C. 212, 333; *The Secret*, 26 L. T. (N. S.) 670. Collision was held to have occurred through "inevitable accident" in the following cases:—*The Shannon*, 1 W. Rob. (Adm.) 463, where a steamer going against the stream collided against a brig coming down at night; *The William Lindsay*, L. R. 5 P. C. 338, where a ship fastened to a buoy in pursuance of port regulations came into collision through the parting of a band round the buoy; *The Peerless*, Lush. 30, the catching of the cable on the windlass when the anchor was let go; *The London*, 1 Mar. Law Cas. 398, cable parting in wind; *The Virgo*, 3 Mar. Law Cas. N. S. 285, breaking of steerage gear through latent defect; *The Buckhurst*, 6 P. D. 152, sailing ship dragging anchor with rudder damaged; *The Swallow*, 3 Mar. Law Cas. N. S. 371, dumb barge driving with the tide; *The Duke of Cornwall*, 1 Pritchard, Adm. Dig. (3rd ed.), 201, steamer navigating at proper rate causing a swell whereby barge in exposed position was made to sink; *The Merchant Prince* (1892), P. 9, in (C. A.) 179, steam steerage gear getting jammed. For the American cases see *The Morning Light*, 2 Wall. (U. S.) 550; *The Java*, 14 Wall. (U. S.) 189; *The Merrimac*, 14 Wall. (U. S.) 199. But where there was negligence the accident was held not inevitable, *The Pladda*, 2 P. D. 34; *Sherman v. Mott*, 5 Bened. (U. S. Dist. Ct.) 372; *The Merrimac*, 14 Wall. (U. S.) 199; the last two cited *Marsden, Collisions at Sea*, (3rd ed.), 13. Master was held not to blame where moorings supplied by river authorities were insufficient in a storm, *The Turkistan*, 13 Rettie 342.

³ (1892) P. 419, see *In re Ship Albano*, 8 Times L. R. 425 (C. A.).

⁴ 11 P. Div. 114.

⁵ 12 P. Div. 46.

⁶ (1892) P. at 429.

showing he used all reasonable care and skill in the circumstances. If he did this and shewed he used "ordinary care and ordinary skill," he would be exonerated; since then he would have disproved negligence. If, however, he set up "inevitable accident," and proved facts which exonerated him from liability by shewing he was not negligent, he might yet be held to have failed in his defence, and possibly to be liable for the costs of proving a defence which, though inadequate under one name, would still effectually dispose of the suit against him. The majority of the Court (Fry and Lopes, L.JJ.), however, adhered to the definition adopted by the Privy Council in *The "Marpesia";*¹ Lopes, L.J., added: "I know no distinction as regards inevitable accident between cases which occur on land and those which occur at sea."²

Overruled by
Fry and
Lopes, J.J.

Onus.

The *onus* of proving inevitable accident is on the defendant. He has to shew that the cause of the accident was a cause the result of which he could not avoid. "If he cannot tell you what the cause is, how can he tell you that the cause was one the result of which he could not avoid?"³ "The burden," says Fry, L.J.,⁴ "rests on the defendants to shew inevitable accident. To sustain that, the defendants must do one or other of two things. They must either shew what was the cause of the accident, and shew that the result of that cause was inevitable; or they must shew all the possible causes, one or other of which produced the effect, and must further shew, with regard to every one of these possible causes, that the result could not have been avoided. Unless they do, one or other of these two things, it does not appear to me that they have shewn inevitable accident."⁵

Blame on
both sides.

The second case put by Lord Stowell⁶ is where there is blame on both sides; as to which the law "is now universally accepted as he stated it."⁷ The Admiralty rule differs from the rule of the common law, and renders each liable to contribute half of the joint damage.⁸ A further distinction from the rule of the

¹ L. R. 4 P. C. 212.

² (1892) P. at 434; for a limitation of this statement, see per Dr. Lushington, *The Bolina*, 3 Notes of Cases, 208, at 210; *The "Marpesia,"* L. R. 4 P. C. 212, at 219, where the suggested limitation did not arise; *The Annot Lyle*, 11 P. Div. 114; *The Indus*, 12 P. Div. 46. *The Benmore*, L. R. 4 A. & E. 132 overrules *The Thomas Lea*, 38 L. J. (Adm.) 37, and decides that on a plea of inevitable accident it is for the plaintiff to begin.

³ Per Lord Esher, M.R., *The Merchant Prince* (1892), P. 179, at 188.

⁴ L. c. at 189.

⁵ In the case cited the alleged inevitable accident arose from failure to act of steam steering gear.

⁶ *The Woodrop Sims*, 2 Dodson (Adm. Cas. 83), at 85. *Ante*, 1318.

⁷ Abbott, *Merchant Ships* (13th ed.), 827.

⁸ *Vaux v. Schaffer*, 8 Moo. P. C. C. 75.

common law has been sought to be made. By the common law, though the plaintiff has contributed to the accident, he is not disentitled to recover if the negligence of the defendant was the proximate, and that of the plaintiff the remote, cause of the injury—that is, if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him.¹ It has been contended that, by Admiralty law, where there has been any negligence on the part of the plaintiff, that negligence is *prima facie* to be reckoned as the cause in the event of a subsequent collision occurring.² As we have already incidentally seen,³ there is no ground for this attempted distinction.

But before a vessel can be held in fault for a collision, negligence contributing to the accident, and not negligence merely, must be shewn.⁴

The cases have been summed up as follows:⁵

Cases
summed up.

1. A ship, A, may recover full damages against another, B, though she (A) has been guilty of negligence contributing to the collision, provided B could, with ordinary care, exerted up to moment of the collision, have avoided it;

2. A can recover nothing, though B was guilty of negligence contributing to the collision, if A, by ordinary care exerted up to the moment of the collision, could have avoided it.

3. A may recover half her loss, though she has been guilty of negligence contributing to the collision, and rendering the collision unavoidable except by extraordinary care on B's part, if B has been guilty of negligence contributing to the collision and rendering it unavoidable except by extraordinary care on A's part; and

4. In the last case B may also recover half her loss.

Where the injuring vessel is alone in fault the owners of the injured vessel are entitled to full compensation—*restitutio in integrum*⁶—as near as may be for the injury their vessel has suffered. They may recover for the loss of her use while laid up for repairs; and, where such exists, the market price for her use is the test of what they may recover under this head. Where there is

Injuring vessel
alone in fault.

¹ *Radley v. London and North-Western Railway Company*, 1 App. Cas. 754.

² *The Fenham*, L. R. 3 P. C. 212; *Hay v. Le Neve*, 2 Shaw (H. L. Sc.) 395.

³ *Ante*, 1325.

⁴ *Cayzer v. Carron Company*, 9 App. Cas. 873; *The Lord Saumarez*, 6 Notes of Cases, 600. In *Seccombe v. Wood*, 2 Moo. & Rob. 290, the injury was caused *actively* by the vessel whose doing damage to the plaintiff's vessel was part of the sequence of the original negligence.

⁵ *Marsden* (3rd ed.), *Collisions at Sea*, 23; *The Monte Rosa* (1893), P. 23, at 30.

⁶ *The City of Peking*, 15 App. Cas. 438, at 442. *Restitutio in integrum*, under the old law and as affected by statute, is discussed in *The Northumbria*, L. R. 3 A. & E. 6, at 12. *Ante*, 227, and *post*, 1346.

no market price evidence is admissible of what she would have earned if not disabled; from this, however, must be deducted the cost of earning it. In no case may the damages exceed the net profit, and the *onus* as to what they are lies on the plaintiff.¹

Onus.
Lord Wensleydale in *Morgan v. Sim*.

As to the *onus probandi* in cases of collision by the fault of both parties, Lord Wensleydale says, in *Morgan v. Sim*:² "There is no question or doubt about the law. The party seeking to recover compensation for damage must make out that the party against whom he complains was in the wrong. The burden of proof is clearly upon him, and he must show that the loss is to be attributed to the negligence of the opposite party. If at the end he leaves the case in even scales, and does not satisfy the Court that it was occasioned by the negligence or default of the other party, he cannot succeed."³

Rule in Court of Admiralty.

No costs.

The Swansea v. The Condor.

The rule of the Admiralty was that where both vessels were to blame neither of them should gain by any litigation in the matter,⁴ and so no costs should be awarded to either. The Privy Council took that view, and adopted the rule in the case of appeals save in exceptional circumstances.⁵ After the coming into operation of the Judicature Acts, in *The Swansea v. The Condor*,⁶ James, L.J., in giving the judgment of the Court of Appeal on a question of costs, doubted whether it could be right that the rule as to costs should differ in two branches of the High Court of Justice, and thought that "in future, the rule will be that the costs in every case follow the result, as in other branches of the High Court." In the subsequent case of the *Milanese*⁷ the same Lord Justice said: "We are of opinion that, wherever we vary the decision of the Court below by finding both vessels to blame, the rule should be that no order is made as to costs either below or on appeal—that is, that each party should bear their own costs of the whole litigation." Subsequently, in *The*

The Milanese.

The Hector.

¹ *The Argentino*, 13 P. D. 191, affd. H. of L. 14 App. Cas. 519; *The Gazelle*, 2 W. Rob. (Adm.) 279; *The Clarence*, 3 W. Rob. (Adm.) 283; *The Potomac*, 105 U. S. (15 Otto) 630.

² 11 Moo. P. C. C. 307, at 311; *The Ligo*, 2 Hagg. (Adm.) 356; *Cayzer v. Carron Company*, 9 App. Cas. 873. See, too, per Dr. Lushington, *The Swanland*, 2 Ecc. & Ad. (Spinks), 107.

³ As to the burden of proof on an allegation that a ship in a collision was in stays, *The Sea Nymph*, Lush. 23. But a ship so placed ought to execute any practicable manœuvre to avoid a starboard tacked vessel; *Wilson v. Canada Shipping Company*, 2 App. Cas. 389, s.c. *sub nom. The Lake St. Clair v. The Underwriter*, 36 L. T. (N. S.) 155. Where a fishing boat was fast to her nets, see *The Columbus*, 1 Pritchard Adm. Dig. (3rd ed.) 239; *The Bottle Imp*, 42 L. J. Adm. 48. Where the ship had hove to, see *The Eleanor*, 2 Mar. Law Cas. 240; *The Rosalie*, 5 P. D. 245. Generally as to *onus* of proof, *ante*, 127.

⁴ *Vennall v. Garner*, 1 Cr. & M. 21.

⁵ The "*Marpesia*," L. R. 4 P. C. 212; *The Islay v. Patience*, 20 Rettie 224.

⁶ 4 P. Div. 115.

⁷ 43 L. T. 107, at 110, affirmed in H. of L. 45 L. T. 151.

Hector,¹ Brett, L.J., said: "The better way to solve the matter is, I think, to say that in order to enforce care at sea, where it is so important that care should be observed, the Court of Appeal will adopt the rule of the Court of Admiralty and the rule of the Privy Council to this extent, that, unless in some exceptional case, such as I have mentioned"—i.e., where the judgment of the Court below has been that both vessels are to blame, and that judgment is affirmed—"they will not, where both sides have been to blame, allow either ship to gain anything by the litigation." This rule has been said to be a "matter of discipline,"² but Cotton, L.J., preferred to regard the rule as established rather by authority than by reason or sound principle.

If by the negligence of one vessel another is driven against a third, both vessels will have an action against the negligent ship.³ The third will only have an action against the second if she were guilty of negligence. In imputing negligence, the greatest allowance must be made for a captain or pilot suddenly put into such difficult circumstances, and the Court will not require perfect nerve or presence of mind, and thus exact from the responsible person the doing of the very best thing possible.⁴

There are cases where the plaintiff is unable to identify the guilty ship, as in *The Evangelismos*,⁵ where the vessel causing the damage got away. Subsequently, from the appearance of a vessel in port, the owners of the damaged vessel caused an arrest to be made, but the plaintiffs failed to identify the vessel seized, and the Admiralty Court dismissed the action with costs, though they refused to award damages for the wrongful arrest. The Privy Council sustained this decision, holding, nevertheless, that "undoubtedly there may be cases in which there is either *mala fides* or that *crassa negligentia*, which implies malice, which would justify a Court of Admiralty giving damages, as in an action brought at common law damages may be obtained." "The real question in this case, following the principles laid down with regard to actions of this description, comes to this—Is there or is there not, reason to say, that the action was so unwarrantably brought, or brought with so little colour or so little foundation, that it rather implies malice on the part of the plaintiff, or that gross negligence which is equivalent to it?" This view was approved in *The Strathnaver*.⁶

Where through the negligence of one vessel another is driven against a third.

Where the injurious vessel cannot be identified. *The Evangelismos*.

Approved in *The Strathnaver*.

¹ 8 P. Div. 218, at 220.

² L. c. per Bowen, L.J., at 221. In *The Quickstep*, 15 P. D. 196, at 202, the rule laid down in *The Hector* was followed.

³ *The Sisters*, 1 P. D. 117; *The Industrie*, L. R. 3 A. & E. 303; *The Kjobenhavn*, 2 Mar. Law Cas. N. S. 213.

⁴ *The Bywell Castle*, 4 P. Div. 219; see per Brett, L.J., at 227. *Ante*, 56.

⁵ 12 Moo. P. C. C. 352.

⁶ 1 App. Cas. 58.

Bemедies of
owners of ships
injured by
collision.

Beyond all doubt the owners of a ship or vessel injured by collision may proceed to recover compensation, at their election, either against the owners or against the master personally, or against the ship herself.¹ The ship's liability, it may be noted, is only to the extent of her value at the time she is arrested, and not for the added value of repairs done upon her.² It is equally beyond doubt that where neither party is in fault and the damage results from unavoidable accident, the loss lies where it falls, and has to be borne by the injured vessel.³ A further exception has to be noted where the vessel in fault is the property of the Sovereign of a foreign State and in the hands of officers employed by him.⁴

The Parlement
Belge.

In The Parlement Belge,⁴ it was contended, in accordance with analogies in the old law⁵ that a ship may be treated as a delinquent *per se* without reference to the liability of the owners in respect of negligence. If the law ever admitted a liability of this sort it no longer allows it. In giving judgment, Brett, L.J.,

Opinion of
Brett, L.J.

¹ The Volant, 1 W. Rob. (Adm.) 387; Maude and Pollock, Merchant Shipping (4th ed.), 619, 620; The Atlas, 93 U.S. (3 Otto) 302. The law and practice in a proceeding in Admiralty *in rem* are laid down in The Bold Buccleugh, 7 Moo. P. C. C. 267, at 284, which is considered in The Rio Tinto, 9 App. Cas. 356, and in The City of Mecca, 6 P. D. 106. The law as to maritime lien is treated in The Henrich Björn, 11 App. Cas. 270; The Sara, 14 App. Cas. 209. The shipowner's lien for freight is treated, Abbott, Merchant Ships (13th ed.), 452-456; Merchant Shipping Act, 1894; 57 & 58 Vict. c. 60, ss. 494 and 495; the lien for necessities or repairs, Abbott, Merchant Ships (13th ed.), 141-149. For the law in the United States, see The J. E. Rumbell, 148 U.S. (41 Davis) 1. A maritime lien is not indelible, but may be lost by negligence or delay where the rights of third parties are compromised; where reasonable diligence is used (which is a question of fact determinable upon the particular circumstances), and the proceedings are had in good faith; the lien travels with the thing into whatsoever possession it may come: The Fairport, 8 P. D. 48. The Merchant Shipping Act, 1889 (52 & 53 Vict. c. 46), was passed to restore the law to the state it was supposed to be in with regard to maritime lien previously to the decision in The Sara, 14 App. Cas. 209. Morgan v. Castlegate Steamship Company, The Castlegate (1893), App. Cas. 38, is a decision of the House of Lords on the meaning of "disbursements made by the master on account of the ship" under sec. 1 of the Act. In the Orienta (1894), P. 271, affirmed (1895), P. 49, the lien conferred by the Act is said to be only in respect of those disbursements with regard to which a lien was supposed to have been created by the Admiralty Court Act, 1861 (24 Vict. c. 10), s. 10, and the test of whether disbursements are within this class is, whether they are such as would, without express authority, have pledged the owners' credit. Sec. 1 of the Act of 1889 is embodied in the consolidating Act, the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 167, sub-s. (2). The master's lien does not take priority of that of seamen, who are entitled to recover their wages from him: The Salacia, Lush, 545; nor of a bottomry bond, on which he is personally liable: The William, Swa. (Adm.) 346; The Jonathan Goodhue, Swa. (Adm.) 524. The seamen's lien for wages is secured by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 164-167.

² The St. Olaf, L. R. 2 A. & E. 360.

³ The Shannon, 1 W. Rob. (Adm.) 463, at 470; The Itinerant, 2 W. Rob. (Adm.) 236 243. As to costs, see The "Marpesia," L. R. 4 P. C. 212, at 221, commenting on The London, B. & L. 82; The Lochlibo, 3 W. Rob. (Adm.) 310, at 318; The Oakfield, 11 P. D. 34.

⁴ The Parlement Belge, 5 P. Div. 197. But where a foreign Sovereign is a plaintiff, whose vessel cannot be seized, he may yet be ordered to give security for damages: The Newbattle, 10 P. Div. 33.

⁵ 5 P. Div. 197. See the very interesting account in Holmes, The Common Law, 26-33.

⁶ 5 P. Div. at 218.

thus expresses himself: "In a claim made in respect of a collision, the property is not treated as the delinquent *per se*. Though the ship has been in collision, and has caused injury by reason of the negligence or want of skill of those in charge of her, yet she cannot be made the means of compensation if those in charge of her were not the servants of her then owner, as if she was in charge of a compulsory pilot. That is conclusive to shew that the liability to compensate must be fixed, not merely on the property but also on the owner through the property." And this is cited with approbation in the House of Lords in *The Castle-gate*¹ and in the Privy Council in *The Utopia*² as correctly expressing the English law.

In the United States there is very high authority the other way. Story J., in giving the judgment of the Supreme Court in *United States v. Brig Malek Adhel*, quotes Marshall, C.J.,³ as follows:⁴ "This is not a proceeding against the owner; it is a proceeding against the vessel for an offence committed by the vessel; which is not the less an offence and does not the less subject her to forfeiture because it was committed without the authority and against the will of the owner. It is true that inanimate matter can commit no offence. But this body is animated and put in action by the crew, who are guided by the master. The vessel acts and speaks by the master. She reports herself by the master. It is therefore not unreasonable that the vessel should be affected by this report;" and again: "The thing is here primarily considered as the offender, or rather the offence is primarily attached to the thing."⁵

Law in the
United States.

Opinion of
Marshall, C.J.,
adopted by
Story, J.

In considering cases of collision the precautions taken by the vessel that is run down must have very considerable weight in determining the rights and liabilities of the respective parties. These precautions are to be judged partly by reference to considerations of nautical care and skill, and partly to general or national usage.⁶ There are some general and broad rules the neglect or observance of which goes far to determine the liability or immunity respectively.

Precautions
taken of weight
in estimating
liability.

The cardinal principle is that the master is bound to take all reasonable precautions—material as well as moral—against his ship doing damage to others.⁷ "The true rule," as laid down in

Duty of
master in
taking pre-
cautions.

¹ (1893) App. Cas. 38, at 52.

² (1893) App. Cas. 492, at 499.

³ *United States v. The Schooner Little Charles*, 1 Brock. (U. S.) 347, at 354.

⁴ 2 How. (U. S.) 210, at 234.

⁵ *The Palmyra*, 12 Wheat. (U. S.) 1, at 14.

⁶ *Story*, Bailm. § 611; *The Friends*, 1 W. Rob. (Adm.) 478, affirmed *sub nom.* *General Steam Navigation Company v. Tonkin*, 4 Moo. P. C. C. 314; *The Lochlibo*, 3 W. Rob. (Adm.) 310, at 319.

⁷ Abbott, *Merchant Ships* (13th ed.) 861. The master's duties are not confined

The William Lindsay,¹ "is that he must take all such precautions as a man of ordinary prudence and skill, exercising reasonable foresight, would use to avert danger in the circumstances in which he may happen to be placed." He is to use all due and proper care that his ship is free from defects likely to cause peril or in any way to render it unfit for the voyage that it is to go; but his obligation does not extend to render the ship secure against defects which no competent skill or care or foresight can detect or avert;² since, as Montague Smith, J., says in *Readhead v. Midland Railway Company*,³ this would be "to promise the performance of an impossible thing, and would be directly opposed to the maxims of law, *Lex non cogit ad impossibilia*"—*Nemo tenetur ad impossibilia*."

Rules as to
British ships.

Following this cardinal principle is another, that the rule of the road must be observed. British ships are rendered subject to certain statutory rules, now consolidated in the Merchant Shipping Act, 1894.⁶

Collisions in
which a foreign
ship is con-
cerned.

Formerly, in the case of a collision occurring on the high seas between two foreign ships or between a British and a foreign ship, the statutory rules were not applicable, and the question of negligence had to be tried by the rules of general maritime law. This was stated by Best, C.J.:⁷ "The custom proved is, that the ship which has the wind at large may go either to leeward or to windward, but that, as a general rule, she ought to expect that the ship which is close-hauled will keep to windward, and therefore she ought to go to leeward unless it is quite clear that she can go to windward with safety."

Lord Black-
burn in *The*
Khedive.

Lord Blackburn, in *The Khedive*,⁸ summarizes the general duties applicable, apart from statutory enactment. "The duty which the Court casts upon him who has the management and control of a ship at sea is the same as that which the law casts on those who have the management of a carriage on shore—viz., to

to avoiding injury to other vessels. As to submarine telegraphs, *Submarine Telegraph Company v. Dickson*, 33 L. J. C. P. 139. As to oyster beds, *The Octavia Stella*, 6 Mar. L. Cas. N. S. 182. See *ante*, 1262, for master's duties in navigation.

¹ L. R. 5 P. C. 338, at 343, *The Ocean Wave*, L. R. 3 P. C. 205; *The Virgo*, 3 Mar. Law Cas. N. S. 285. In the earlier stages of *Clyde Navigation Company v. Barclay*, 1 App. Cas. 790, it was contended that the ship was not properly manned, because, though the number on the trial trip was sufficient, yet they were not regularly constituted officers and crew. This point, however, was abandoned in the House of Lords. See *The C. M. Palmer* and *The Larnax*, in the Privy Council, 2 Mar. Law Cas. N. S. 94.

² *Lack v. Seward*, 4 C. & P. 106.

³ L. R. 4 Q. B. 379, at 385.

⁴ Co. Litt. 231 b. See per Willes, J., in *Lloyd v. Guibert*, L. R. 1 Q. B. 115, at 121; *Baily v. De Crespigny*, L. R. 4 Q. B. 180, at 185; *In re Arthur*, *Arthur v. Wynne*,

14 Ch. D. 603, per Jessel, M.R., 608. *Ante*, 959, n. 4.

⁵ Cp. D. 50, 17, 185: *Impossibilium nulla obligatio est*; Story Eq. Jur. § 1308.

⁶ 57 & 58 Vict. c. 60, ss. 418-426.

⁷ *Handyside v. Wilson*, 3 C. & P. 528.

5 App. Cas. 876, at 890.

take reasonable care and to use reasonable skill to prevent it from doing injury, yet that the different nature of the two things makes a great difference in the practical application of the rule. Much greater care is reasonably required from the crew of a ship who ought to keep a look-out for miles, than from the driver of a carriage who does enough if he looks ahead for yards; much more skill is reasonably required from the person who takes the command of a steamer than from one who drives a carriage."

The inconvenience felt by the occasional inconsistency of the statutory rule with the rule of the maritime law (which was sometimes even productive of collisions), led to the adoption of international regulations, by which the former difficulties are now obviated. Local usages as to ships, lights, and rules to be observed in navigating foreign waters are still to be observed; and although they have not the force of law in the English Courts, yet failure to conform to them would be cogent evidence of negligence.¹

International regulations.

If a vessel be at anchor, whether properly² or improperly, it is the bounden duty of a vessel in motion to avoid collision.³ This has been differently laid down in America; where, in the case of *The Schooner Marcia Tribou*,⁴ a schooner going out of Boston harbour ran into a sloop that was anchored in the channel; both vessels were held in fault—the schooner for not keeping a proper look-out, and the sloop for being improperly anchored. This decision is clearly not maintainable in England,⁵ and on the principle already enunciated—that there must be not merely negligence, but negligence as a contributory cause of the accident.

Ship at anchor.
American decision.
The Schooner Marcia Tribou.

The absence of negligence on the part of the moving vessel it is which distinguishes the case of *The Schooner Marcia Tribou* from *Strout v. Foster*, where the judges of the Supreme Court of the United States were equally divided, and the judgment of the Circuit Court was consequently maintained, holding that where there is no negligence in the moving ship, and a collision occurs with a ship improperly anchored, the third rule laid down by Lord Stowell in the *Woodrop Sims*⁶ applies, and the misconduct on the part of the master of the ship so improperly anchored

Strout v. Foster.

¹ In *General Steam Navigation Company v. Mann*, 14 C. B. 127, at 133, Maule, J., is reported as saying during the argument: "The only effect of the Admiralty regulation is to substitute the sailing directions there given for the rule of practice which existed before, to make it more effective; not to alter the proof of negligence."

² *The Steamboat New York v. Rea*, 18 How. (U. S.) 223.

³ *The Batavier*, 2 W. Rob. (Adm.) 407; *The "City of Peking"* and *The Compagnie des Messageries Maritimes*, 14 App. Cas. 40.

⁴ 2 Sprague (U. S. Adm.) 17.

⁵ *Cp. Harris v. Anderson*, 14 C. B. N. S. 499; *The Douglas*, 7 P. Div. 151.

⁶ 1 How. (U. S.) 89; 1 Dodson, (Adm. Cas.) 83. *Ante*, 1318.

imports a liability where there is no fault or want of skill on the part of those responsible for the other ship. This decision is an *à fortiori* case, assuming *The Marcia* Tribou¹ to be rightly decided. On the contrary assumption, the case seems one of inevitable accident—that is, an accident “which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution, and maritime skill”;² and further appears to be covered by the Lord Selborne, C.’s, *dictum* in *Spaight v. Tedcastle*:³ “Contributory negligence” “cannot be established merely by shewing that, if those in charge of the ship had in some earlier stage of navigation taken a course, or exercised a control” “which they did not actually take or exercise, a different situation would have resulted, in which the same danger might not have occurred.”⁴

Dictum of Lord Selborne, C., in Spaight v. Tedcastle.

General rule.

A vessel is to blame for placing herself at single anchor in such a position that, if the slightest accident arise to interrupt or embarrass a manœuvre, it is almost impossible to avoid a collision.⁵

Collision between vessel under sail and one at anchor.

When a collision takes place between a vessel under sail and one at anchor, the *prima facie* presumption, if there be any fault, is that it is on the part of the vessel which is under sail; and “the *onus probandi* lies with the vessel that is in motion, and she is *prima facie* bound to show a sufficient cause why she came in contact with the vessel which was stationary, and which was consequently comparatively helpless.”⁶ The vessel under sail must accordingly clear herself from the imputation by shewing that every practicable effort was made to avoid the collision; and this obligation is not altered by the fact that at the time of the collision the moving ship was drifting in consequence of a prior collision.⁷

Vessel entering a harbour in the night time.

Another rule, “admitting perhaps of no exception,” is that when a vessel enters a harbour in the night time it must use the utmost vigilance; more especially so when the harbour is one greatly frequented.⁸

Question whether there is an unqualified obligation to exhibit a light.

The obvious precaution is to exhibit a light, both when sail-

¹ 2 Sprague (U. S. Adm.) 17.

² Per Dr. Lushington, *The Virgil*, 2 W. Rob. (Adm.) 201, at 205. *Ante*, 1324.

³ 6 App. Cas. 217, at 219.

⁴ *Cayzer v. Carron Company*, 9 App. Cas. 873.

⁵ *The Egyptian*, 1 Moo. P. C. C. N. S. 373.

⁶ *The Victoria*, 3 W. Rob. (Adm.) 49, per Dr. Lushington, at 52. *The Scioto*, Daveis (U. S. Adm.) 359. In this case it is said, at 363: “A vessel entering a harbour under the circumstances of the *Scioto* is responsible *de levissima culpa*.” *The City of Peking* and *The Compagnie des Messageries Maritimes*, 14 App. Cas. 40. The burden is on the moving ship to excuse herself. *The Culgoa*, 9 Times L. R. 564 (C. A.).

⁷ *The Annapolis*, 5 L. T. (N. S.) 326; *The George Arkle*, Lush. 382.

⁸ *The Scioto*, Daveis (U. S. Adm.) 359; *The Ariadne*, 13 Wall. (U. S.) 475; see Angel, *Law of Carriers* (5th ed.), at 624.

ing and when at anchor. In *The Victoria*,¹ Dr. Lushington held that there is no general and unqualified obligation to do this, though, where the exhibiting a light would tend to prevent collision, there is an obligation to shew one, on the ground that "no man can justly complain of an accident that happens to himself if by reasonable and proper precaution he could have prevented it."²

Dr. Lushington in *The Victoria* denies its existence.

In *The Saxonia*³ the Privy Council affirms the absolute obligation which in the earlier case Dr. Lushington denies. "A vessel at anchor," says the Master of the Rolls,⁴ giving the opinion of the Committee in that case, "or a fishing-boat, is bound by the general rules of the sea to exhibit a light so as to afford to the vessels whose duty it is to avoid her, the means of doing so." And this, even apart from authority, seems the preferable opinion. *Prima facie*, in a collision between a vessel at anchor and one in motion in the daytime, the collision raises a presumption of the negligence of the ship in motion which has to be rebutted.⁵

Such an absolute obligation held to exist in *The Saxonia*.

It has always been held to be a duty on the part of a vessel under weigh to exhibit a light. "It is, I apprehend, the bounden duty," says Dr. Lushington,⁶ of a vessel under weigh, whether the vessel at anchor be properly or improperly anchored, to avoid if it be possible, with safety to herself, any collision whatever. This is not only the doctrine of the maritime law, but it is also the doctrine of the common law with respect to carriages on the high road." If there is an obligation for a vessel at anchor to exhibit a light, *a fortiori* a vessel in motion must do so; and this is definitely held by the Privy Council in the case just cited.⁷

Obligation on a vessel under weigh to exhibit a light.

By the various regulations for preventing collisions at sea, by which ships of various countries are bound, specified lights must be carried in all weathers from sunset to sunrise,⁸ and in the precise way that is necessary for giving the warning enjoined by the regulation.⁹

Rules as to lights.

¹ 3 W. Rob. (Adm.) 49.

² L. c. at 54.

³ Lush. 410. Cp. *The C. M. Palmer and The Larnax*, 2 Mar. L. C. N. S. 94.

⁴ Sir John Romilly. Lush. at 422.

⁵ *The Annot Lyle*, 11 P. D. 114; *The Indus*, 12 P. D. 46; *The Merchant Prince* (1892), P. 179.

⁶ *The Batavier*, 2 W. Rob. (Adm.) 407. As to a vessel being launched coming into collision, see *The Cachapool*, 7 P. D. 217; also *The Vianna, Swa.* (Adm.) 405; *The United States*, 12 L. T. (N. S.) 33; *The Glengarry*, 2 P. D. 235. The "utmost precaution" must be used and reasonable notice of the launch given: *The Andalusian*, 2 P. D. 231. It must not be a mere general notice that a launch is to take place on a particular day: *The Blenheim*, 2 W. Rob. (Adm.) 421. The notice must so specify the time of the launch that vessels navigating up and down the river may not be damaged or incur danger: *The Glengarry*, 2 P. D. 235, at 236.

⁷ *The Saxonia*, Lush. 410, at 422.

⁸ *The City of New York*, 147 U. S. (40 Davis) 72. See art. 2, Regulations of 1884; *Ex parte Ferguson and Hutchinson*, L. R. 6 Q. B. 280; also Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 418 (1) (2), 419 (1) (2), 424, which Act, by s. 745, preserves the Regulations as they were at the time of the passing of the Act.

⁹ *The Palinurus*, 13 P. D. 14; *The Patroclus*, 13 P. D. 54; *The Imbro*, 14 P. D. 73; *The Talbot* (1891), P. 187.

Fog or
darkness.

The Virgil.

The duty to use care in the case of fog or darkness rises in proportion to the need for care.¹ In *The Itinerant*² this obligation is expressed to be "to use the utmost vigilance;"³ still, by this no more must be understood than a duty to use the amount of vigilance which a master of competent skill would judge called for by the circumstances; for there is no invariable rule of conduct. Thus, in *The Virgil*,⁴ sailing on a dark and foggy night with topmast studding sails set was held to be negligence; while in the case of *The Ebenezer*,⁵ where in dark and thick weather a vessel running with a fair wind on a foggy night carrying her square sail, topmast studding sail, fore and aft mainsail, and gaff topsail set, came into collision, she was yet held not liable for a collision, on the ground of inevitable accident.⁶ In this latter case the sail was carried to prevent vessels immediately in the wake of the colliding vessel running into her, and conduct that otherwise had been negligent thereby became justified.

Steam vessel
to anchor if
fog very dense.

If the fog is very dense, it becomes the duty of a steam vessel to anchor as soon as possible.⁷ When in such a fog a whistle or fog-horn is heard on either bow, and approaching, by a steam vessel not anchored, "it may be laid down as a general rule of conduct that it is necessary to stop and reverse."⁸

The Ceto.
Lord Herschell,
C.'s opinion.

The duty on a vessel in a thick fog where, apart from sound, no conclusion could be arrived at as to the whereabouts of some other vessel within sound of her, is put even higher than this by the judgment of the House of Lords in *The Ceto*.⁹ There the Lord Herschell, C., formulated the facts as follows:¹⁰ "Two vessels approaching each other in a dense fog without the means of

¹ Abbott, *Merchant Ships* (13th ed.), 842-847.

² 2 W. Rob. (Adm.) 236. See also *The Mellona*, 3 W. Rob. (Adm.) 7; *The Pennsylvania*, 23 L. T. (N. S.) 55; *The Westphalia*, 24 L. T. (N. S.) 75; *The Magna Charta*, 25 L. T. (N. S.) 512; *The Frankland and The Kestrel*, L. R. 4 P. C. 529. A sailing vessel when hove to in a fog should ring a bell, and not use a horn: *The Alfredo*, 30 Fed. Rep. 842. As to duty of steamer before entering fog, *The N. Strong* (1892), P. 105.

³ 2 W. Rob. (Adm.) at 243.

⁴ 2 W. Rob. (Adm.) 201.

⁵ 2 W. Rob. (Adm.) 206. What is "moderate speed" in a fog is considered in *The Ebor*, 11 P. D. 25. "In my opinion a vessel approaching another from aft, and being more than two points abaft the beam of the foremost ship—a position from which the coloured side lights of the foremost vessel would not be visible—is an overtaking vessel within the meaning of Art. 11, and a vessel is not an overtaking vessel within the meaning of this article, unless she is more than two points abaft the beam of the other vessel": per Butt, J., *The Imbro*, 14 P. D. 73, at 77.

⁶ *Ante*, 1324.

⁷ *The Otter*, L. R. 4 A. & E. 203; *The Lancashire*, L. R. 4 A. & E. 198; *Little v. Burns*, 9 Retlie 118, is a case of two steam vessels in a fog.

⁸ Per Brett, M.R., *The John McIntyre*, 9 P. Div. 135.

⁹ 14 App. Cas. 670; *The Lancashire* (1893), P. 47, (1894), App. Cas. 1; *The Memnon*, 62 L. T. 84; *The Knarwater*, 63 L.J. (P. D. & A.), 65.

¹⁰ 14 App. Cas. at 675. Cp. the American cases: *The Colorado*, 91 U. S. (1 Otto) 692; *The Nacoochee*, 137 U. S. (30 Davis) 330.

ascertaining the course which either ship is pursuing, continue to approach each other, and when one of them which has pursued a correct course finds that the other is pursuing a wrong one, which must almost inevitably lead to a collision, she still continues a course which was originally right, but which on these facts it appears to me threw upon her the duty of stopping and reversing." The conclusion the Lord Chancellor drew was: "Inasmuch as she did not pursue that course I think she was to blame." And Lord Selborne in the same case¹ was of opinion that to fix such a vessel with contributory negligence even though she had not ceased herself to pursue a right course it was merely necessary to make out "that she had sufficient knowledge of the wrong course which the other ship was taking within sufficient time to enable her officer or officers in charge to perceive that they ought to alter or stop their own course in order to avoid the risk of collision, and that by doing so, that risk would certainly be diminished and might perhaps be avoided."²

Lord Selborne's opinion.

If a vessel is on the open sea in a fog and not on any particular track of ships until she hears something, it may be assumed no ship is near her. If she hears a whistle astern there is no reason why she should stop, nor yet if the whistle sounds on either beam; if, however, a whistle is heard on either bow, "then the ship hearing that sound ought to be brought to a moderate speed though the sound be apparently distant. But if the whistle is ahead, it then becomes necessary to take extreme precautions."³ There is no hard-and-fast rule that in a fog a vessel is not to alter her helm until the signals of the other give a clear indication of her direction. Each case must depend on its own circumstances; and these may afford reasonable ground for believing what the direction is.⁴ In the *Martello*,⁵ the English and American courts were said to be in perfect accord with regard to the duty of a vessel hearing a horn blown in a fog. The law is thus expressed:⁶ "In the *Kirby Hall*,⁷ it was held to be the duty of a steamship hearing the steam whistle of another steamship in close proximity, in a dense fog, but unable to ascertain her course and position, to stop and reverse her engines, so as to take all way off of her, and bring her to a standstill. So, in *The John McIntyre*,⁸ it was held that while the master of a steamship was not at once bound the moment he heard a whistle, wherever it might be, to stop and reverse his engines; yet, if, in

Vessel on open sea in fog.

English and American rule in accord.

¹ 14 App. Cas. at 677.

² See also per Lord Watson, *l. c.* at 686.

³ Per Lord Esher, *M.R.*, *The Ebor*, 11 P. Div. 25, at 27; *The Kirby Hall*, 8 P. D. 71.

⁴ *The Vindomora*, 14 P. Div. 172 (1891), App. Cas. 1.

⁵ 153 U. S. (46 Davis) 64.

⁶ *L. c.* at 72.

⁷ 8 P. D. 71.

⁸ 9 P. D. 135.

a dense fog he hears the whistle or fog-horn of another vessel more than once on either bow, and in the vicinity, from such a direction as to indicate that the other vessel is nearing him, it is his duty to at once stop and reverse, so as to bring his vessel to a standstill. In *The Dordogne*,¹ it was said to be the duty of a steamer, on hearing the first whistle, to reduce her speed, and as the vessels get nearer to bring the ship to as complete a standstill as is possible without putting her out of command, and when the other vessel has come close to, even though not in sight, to stop and reverse the engines."²

Sailing vessel
and steam
vessel.

A vessel with the wind free is bound to give way to a vessel close hauled, and a steam ship is a vessel with the wind free.³ Thus, in all situations a steam vessel is bound to give way to a sailing vessel;⁴ or, to state the rule somewhat differently, whatever a sailing vessel going with a free wind would be required to do with reference to any sailing vessels she meets,⁵ in that manner should a steam vessel in any situation be required to act, with reference to any sailing vessel whatever.⁶ It is equally imperative for the sailing vessel to keep her course.⁷

Duty on
steamer.

To render a steamer liable for an omission there should, says Lord Westbury,⁸ be proof of three things—first, that the thing omitted to be done was clearly within the power of the steamer to do; secondly, that if done it would in all probability have prevented collision; and thirdly, that it was an act which would have occurred to any officer of competent skill and experience in command of the steamer.

Steam ships
mutually
approaching.

With steam ships approaching each other neither can be excused from responsibility merely upon the ground that it was the duty of the other to adopt the corresponding precautions at the same time, if it appears that the party setting up that excuse enjoyed equal opportunity of conforming to the requirements of the regulation; for the law requires both to adopt every

¹ 10 P. D. 6.

² Cp. *The "Frankland,"* L. R. 4 P. C. 529.

³ *The Saxonia*, Lush. 410.

⁴ *The Warrior*, L. R. 3 A. & E. 553; *The Velasquez*, L. R. 1 P. C. 494; *The Adriatic*, 107 U. S. (17 Otto) 512. In *Crockett v. Newton*, 18 How. (U. S.) 581, at 583, it is said that though this rule should not be observed when circumstances are such that it is apparent its observance must occasion a collision, while a departure from it will prevent one, yet it must be a strong case which will put the sailing vessel in the wrong for obeying the rule. See *The Britannia*, 153 U. S. (46 Davis) 130, at 144.

⁵ As to this duty, see *The Peckforton Castle*, 3 P. D. 11. As to "overtaking" ships and ships "being overtaken," see *The Main*, 11 P. D. 132. See *The Essequibo*, 13 P. D. 51; *The Talabot*, 15 P. D. 194; *The Molière* (1893), P. 217.

⁶ *The Gazelle*, 2 W. Rob. (Adm.) 515, at 518; *The Columbine*, 2 W. Rob. (Adm.) 27; *The Aleppo*, 35 L. J. Adm. 9.

⁷ *The "Illinois,"* 103 U. S. (13 Otto) 298.

⁸ *The "City of Antwerp,"* L. R. 2 P. C. 25, at 34. Cp. *The "City of Peking"* v. *Compagnie des Messageries Maritimes*, 14 App. Cas. 40.

necessary precaution and will not tolerate an apportionment of the duty of precaution.¹

It is not the law that a steamer must change her course or *Ships meeting.* must slacken her speed the instant she comes in sight of another vessel, no matter in what direction it may be.² Other things being equal, it is the duty of a vessel going against the tide to stop to avoid a collision, since her movements can be controlled with less difficulty than those of the other vessel.³ If, however, two steamers are meeting each other end on or nearly so, where there is plenty of sea room and are at a considerable distance from each other, it is not the duty of either to stop, reverse, or slacken. The duty of each is to pass on the portside, and the rate of speed is not an element in the case.⁴ The duty of a steamer to keep out of the way of a sailing ship implies a correlative obligation on the part of the ship to keep her course and to do nothing to mislead the steamer.⁵ Nor is the steamer called to act except when she is approaching a sailing ship in such a direction as to involve a risk of collision. She is not required to take precautions where there is no apparent danger.⁶

The law on these matters is settled in the Regulations to which *Regulations.* allusion has already been made, and to the text of which reference must be had.⁷

The rules are not an unfailing test of the obligation of the master; as their application is limited by the consideration that the circumstances are "such that it ought to have been present to the mind of the person in charge, that it [the rule] was applicable."⁸ In the event of a case occurring provided for by a rule the applicability of which is not apparent to a competent navigator, the person failing to follow it is discharged, notwithstanding conformity to the rule would have obviated the accident. But

Where the rules are not applicable.

¹ The *America*, 92 U. S. (2 Otto) 432. See *Maclaren v. Compagnie Française de Navigation à Vapeur*, 9 App. Cas. 640; The *Manitoba*, 122 U. S. (15 Davis) 97, where the fault was not stopping and reversing, though the collision was mainly caused by the fault of the other vessel. Cp. The *Stammore*, 10 P. D. 134.

² The "*Jesmond*" and the "*Earl of Elgin*," L. R. 4 P. C. 1, explained *Scielluna v. Stevenson*, The *Rhondda*, 8 App. Cas. 549, at 558. Cp. The *Britannia*, 153 U. S. (46 Davis), 130; The *Servia*, 149 U. S. (42 Davis), 144.

³ The *Galatea*, 92 U. S. (2 Otto) 439.

⁴ The *Free State*, 91 U. S. (1 Otto) 200.

⁵ The *Highgate*, 62 L. T. 841.

⁶ The *Scotia*, 14 Wall. (U. S.) 170. As to circumstances under which a steamship is "not under command," The *P. Caland* (1893), App. Cas. 207.

⁷ The Regulations at present in force are set out, with the cases upon them, in *Marsden, Law of Collisions at Sea* (3rd ed.), and in *Abbott, Merchant Ships* (13th ed.), 832, 861, and are also printed *in extenso* in the *Digest of Cases to the Law Reports*, 1881-1885. Revised Regulations, consisting of the Washington Rules, with three modifications in detail, and the omission of article 9, have been published. These are proposed to be made effectual by issuing an Order in Council under 57 & 58 Vict. c. 60, s. 418, so soon as the principal Maritime Powers have signified their adhesion to them.

⁸ Per Lord Herschell, The *Theodore H. Rand*, 12 App. Cas. 247, at 250, citing Lord Esher, M.R., The *Beryl*, 9 P. Div. 137, at 138.

admitting the application of the rule, and supposing a departure from it in circumstances where its relevancy ought to be present to the mind of the person responsible, the sequence of cause and effect is not narrowly to be scrutinized, for the governing consideration is "that if the absence of due observance of the rule can by any possibility have contributed to the accident, then that the party in default cannot be excused."¹

Where
intention of
not conforming
to rules is
manifested by
another ship.
The
Commerce.

The Byfoged
Christensen.

Rule of action
in emergency.

The Khedive.

The duty of the master of a ship where the intention of not conforming to the rules is manifested by another ship with which a collision subsequently ensues was considered by Dr. Lushington in *The Commerce*;² the principle laid down was that, when those on board one vessel approaching a collision find that those on the other vessel are not going to perform their duty, they ought not pertinaciously to adhere to the letter of the rule when by varying from the rule some manœuvre might be executed which might probably avert an impending collision. This principle was considered by the Privy Council in *The Byfoged Christensen*,³ where it was said that, though in itself a sound one, great caution is necessary in its application; since "to leave to masters of vessels a discretion as to obeying or departing from the sailing rules is dangerous to the public; and that to require them to exercise such discretion, except in a very clear case of necessity, is hard upon the masters themselves, inasmuch as the slightest departure from these rules is almost invariably relied upon as constituting a case of at least contributory negligence."⁴

The ordinary rule of law is that when two vessels are approaching near to each other under steam, each steering a proper course, and one is suddenly, by a wrong manœuvre of the other, placed in a position of critical danger, the one shall not be deemed to be in fault by reason of her captain not having given orders to slacken speed or to stop and reverse, if it is established that a captain of ordinary care, skill, and nerve might be fairly excused in the circumstances for not having given such order. This is no longer effectual in the case of Statutory Regulations; for the House of Lords, in *The Khedive*,⁵ decided that it was no answer when the rules had been infringed to say that a master had acted from the best of motives and to the best of his judgment; for the law is not that the master is to do what seems to him best, but that he is to obey the Regulations. Actual neces-

¹ Per Sir James Hannen, the "*Arklow*," 9 App. Cas. 136, at 139.

² 3 W. Rob. (Adm.) 287.

³ 4 App. Cas. 669, at 672.

⁴ *Cp. New York and Liverpool, &c. Steamship Company v. Rumball*, 21 How. (U. S.) 372, at 383; *The Hibernia*, 2 Mar. Law Cas. N. S. 454; *The Magnet*, L. R. 4 A. & E. 417.

⁵ 5 App. Cas. 876. See *The Main*, 11 P. D. 132; *The Imbro*, 14 P. D. 73, considered in *The Stakesby*, 15 P. D. 166.

sity, not considerations of expediency merely, can alone excuse their non-observance. From that it was argued that success alone would justify any departure from them.

This argument was not acceded to in *The Benares*,¹ where the decision in *The Khedive* was explained not to be absolute, but to admit of a departure from the Regulations, where "such departure is the one chance still left of avoiding danger which otherwise was inevitable."² In *The Benares* the Court refused to hold a ship to blame for a collision when the ship, being not otherwise in fault, with a collision all but inevitable, as a last chance adopted a course not pointed out by the Regulations.

In a previous case, *The Fanny Carvill*,³ the contention that mere proof that the infringement of a regulation did not contribute

to a collision was rejected, and the Privy Council adopted a view of 36 and 37 Vict. c. 85 s. 17,⁴ which, while it excludes proof that infringement of a Statutory Regulation which might have contributed to a collision did not in fact do so, yet allows the party guilty of the infringement to show that it could not possibly do so. Thus, in *The Duke of Buccleuch*,⁵ where it was proved that lights carried by one of two vessels which came into collision were partially obscured so as to infringe a Statutory Regulation, it was held by the Court of Appeal, reversing Butt, J., to be the duty of the Court to inquire into the position of the vessels; and if from the admitted relative positions of them the partially obscuring of the lights (the inculpatory circumstance relied on in the case) could manifestly have no possible effect on the collision, or if from the evidence in case of a dispute the Court were of the opinion it could not, then the vessel with defective lights would not be held to blame on that account for the collision.

The Duke of Buccleuch was taken to the House of Lords,⁶ and there, on the construction of the facts, the judgment of the

¹ 9 P. D. 16.

² *L. c.* per Bowen, L.J., at 19. See per Lord Watson, *The Khedive*, 5 App. Cas. 876, at 904, and per Lord Hatherley, at 908.

³ Decided in 1875, and reported in a note to 13 App. Cas. 455, approved in *The "Hochung,"* 7 App. Cas. 512, referring to 2 Mar. Law Cas. (N. S.) 569. See *The Martello*, 153 U. S. (46 Davis) 64, where at 74, speaking of failure to provide a ship with the fog-horn prescribed by the International Regulations the Court said: "The presumption is that this fault contributed to the collision. This is a presumption which attends every fault connected with the management of the vessel, and every omission to comply with a statutory requirement, or with any regulations deemed essential to good seamanship. In *The Pennsylvania*, 19 Wall. (U. S.) 125, at 136, it was said that 'in such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been;' " and *Richelieu Navigation Company v. Boston Insurance Company*, 136 U. S. (29 Davis) 408.

⁴ Repealed by the Merchant Shipping Act, 1894, (57 & 58 Vict. c. 60), sch. xxii., but re-enacted by s. 419 (4).

⁵ 15 P. D. 86.

⁶ (1891) App. Cas. 310. See *The Love Bird*, 6 P. D. 80.

Court of Appeal was affirmed, the House being equally divided, Lord Herschell and Lord Macnaghten being of opinion that the view of the Court of Appeal was the right one, while Lord Bramwell and Lord Hannen were for restoring the judgment of Butt, J. On the point of law the House were unanimous that the true construction of sec. 17 of the Merchant Shipping Act, 1873, is that the infringement must be one having some possible connection with the collision;¹ or, in other words, the presumption of culpability may be met by proof that the infringement could not by any possibility have contributed to the collision. The burden of shewing this lies on the party guilty of the infringement, and proof that the infringement did not in fact contribute to the collision is to be excluded.²

Conduct during the crisis of a collision.

Judgment of James, L.J., in *The Bywell Castle*.

Where the master of a ship fails to use extraordinary skill or nerve, the exertion of which might have avoided the collision, his failure is not to be imputed to him as negligence, if he is placed in the position calling for the exertion of such unusual faculties by the conduct of those on the other vessel. "My opinion," says James, L.J., in *The Bywell Castle*,³ "is that, if, in that moment of extreme peril and difficulty, such other ship happens to do something wrong so as to be contributory to the mischief, that would not render her liable for the damage, inasmuch as perfect presence of mind, accurate judgment, and promptitude under all circumstances are not to be expected. You have no right to expect men to be something more than men." The same holds good in perils brought about by inevitable natural agencies; for the obligation of the master is to use, not exceptional, but merely competent skill.⁴ "The Court," says Butt, J., in *The Emmy Haase*,⁵ "is not bound to hold that a man should exercise his judgment instantaneously, a short, but a very short, time must be allowed for this purpose."

Time of application of the Regulations.

"Another rule of interpretation of these Regulations," says Brett, M.R., in *The Beryl*,⁶ "is (the object of them being to avoid risk of collision) that they are all applicable at a time when the risk of collision can be avoided—not that they are applicable when the risk of collision is already fixed and determined. We have always said that the right moment of time to be considered is

¹ 36 & 37 Vict. c. 85. See now Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 419 (4).

² Cp. *The Tasmania*, 14 P. Div. 53, a decision on the Regulations for Preventing Collisions at Sea, Art. 14, reversed 15 App. Cas. 223.

³ 4 P. Div. 219, at 223. There is a valuable judgment by Clifford, J., in *The Seagull*, 23 Wall. (U. S.) 165.

⁴ *The City of Antwerp*, L. R. 2 P. C. 25. Story, *Bailments*, § 117. *The Marpesia*, L. R. 4 P. C. 212, at 220. *The Khedive*, 5 App. Cas. 876, per Lord Blackburn, at 894.

⁵ 9 P. D. 81, at 83.

⁶ 9 P. Div. 137, at 140.

that which exists at the moment before the risk of collision is constituted."

Yet, again, since they are issued for the guidance of masters of vessels, they are to be read literally.¹ By reading them literally is not to be understood the construction of a philologist, or that of one versed in the shades and niceties of meaning words may bear, "but according to a reasonable and business interpretation of *it* [them] with regard to the trade or business with which it is [they are] dealing."²

By the Merchant Shipping Act, 1894,³ s. 422, where the master or person in charge of either vessel⁴ sails away after collision without first ascertaining whether the other vessel has need of assistance, and rendering to the other vessel such assistance as may be practicable, and furnishing particulars as to his own, the master or person in charge of the ship so sailing away shall be presumed guilty of negligence,⁵ and damage may be recovered without further proof.⁶ Further, if the master or person in charge fails without reasonable cause to comply with this section, he shall be guilty of a misdemeanour. But the law will not compel a ship to remain alongside another which has been injured, and thus to run a risk of capture by an enemy's fleet.⁷

¹ The *Libra*, 6 P. Div. 139, per Jessel, M.R., at 142. The decision in *The Libra* is explained in *The Margaret*, 9 P. Div. 47; but see *s. c. sub nom. Cayzer v. Carron Company*, 9 App. Cas. 873. Cp. *The Monte Rosa* (1893), P. 23, at 31.

² *The Dunselm*, 9 P. Div. 164, per Brett, M.R., at 171. As to what is a "risk of collision," see per Dr. Lushington, *The Mangerton*, Swa. (Adm.) 120; 17 & 18 Vict. c. 104, s. 296, repealed 25 & 26 Vict. c. 63, s. 2, repealed Statute Law Revision Act, 1875; *The Ericsson*, Swa. (Adm.) 38; *The Dumfries*, Swa. (Adm.) 63; *The Cleopatra*, Swa. (Adm.) 135; *The Wenona*, 19 Wall. (U. S.) 41, at 52; *The Nichols*, 7 Wall. (U. S.) 656; *The Free State*, 91 U. S. (1 Otto), 200, where the authorities, American and English, are collected.

³ 57 & 58 Vict. c. 60, reproducing with verbal alterations 36 & 37 Vict. c. 85, s. 16.

⁴ Vessel is defined to include any ship or boat, or any other description of vessel used in navigation, 57 & 58 Vict. c. 60, s. 742.

⁵ *The Queen*, L. R. 2 A. & E. 354—a decision on 25 & 26 Vict. c. 63, s. 33, repealed 36 & 37 Vict. c. 85, s. 33; *Ex parte Ferguson and Hutchinson*, L. R. 6 Q. B. 280; *The Adriatic*, 3 Mar. Law. Cas. N. S. 16. See note by Mr. Holmes on Statutory Limitations, 3 Kent. Comm. (12th ed.) 217.

⁶ As to the law previous to statutory enactment, the "*Celt*," 3 Hagg. (Adm.) 321. As to the law under s. 16, of 25 & 26 Vict. c. 85, *The Adriatic*, 33 L. T. (N. S.) 102. The rule as to damages naturally flowing from the wrongful act is the same in Admiralty as we have seen it to be at common law, *ante*, 93. In *The Mellona*, 3 W. Rob. (Adm.) 7, where a vessel having been run down, subsequently became unmanageable and got upon a sandbank and was lost, Dr. Lushington ruled that the presumption of law is that eventual loss is attributable to the effects of the collision, and not to any new cause, as the mismanagement of the persons on board. As to measure of damages, *The Parana*, 2 P. Div. 118; *The Notting Hill*, 9 P. Div. 105; *The Argentino*, 13 P. Div. 191, 14 App. Cas. 519. See *The Birkenhead*, 3 W. Rob. (Adm.) 75; *The City of Lincoln*, 15 P. D. 15, as to natural and reasonable consequences. In *Smith v. Condry*, 1 How. (U. S.) 28, actual damage at the time and place of injury is said to be the measure of damages in cases of collision, as in insurance cases, and not the probable profits at the port of destination. See *Parsons, Law of Shipping*, vol. i. 540, 544, where the cases are collected in elaborate notes. The rule of damages in collision in the United States will be found in *The Baltimore*, 8 Wall. (U. S.) 377, where the leading maxim is said to be *restitutio in integrum*; and this is reiterated in *The "Atlas"*, 93 U. S. (3 Otto), 302. *Post*, 1346.

⁷ *The Thuringia*, 41 L. J. (Adm.) 44.

Statutory
limitation of
liability.

The Merchant Shipping Act,¹ 1894, s. 503,² provides that "the owners of a ship,³ British or foreign,⁴ shall not, where all or any of the following events occur without their actual fault or privity⁵—that is to say :

- a. Where any loss of life or personal injury is caused to any person being carried in the ship ;
- b. Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship;⁶
- c. Where any loss of life or personal injury is caused to any person carried in any other vessel by reason of the improper navigation⁷ of the ship ;
- d. Where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel by reason of the improper navigation of the ship ;

be liable⁸ to damages beyond the following amounts ; (that is to say), (i) in respect of loss of life or personal injury, either alone or together, with loss of or damage to vessels, goods, merchandise, or other things, to an aggregate amount not exceeding £15 for each ton of their ship's tonnage ; and (ii) in respect of loss of or damage to vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, an aggregate amount not exceeding £8 for each ton of the ship's tonnage.⁹ For the purposes of this section the tonnage of a

¹ 57 & 58 Vict. c. 60.

² *Nixon v. Roberts*, 30 L. J. Ch. 844.

³ *The Amalia*, B. & L. 151 ; *The Spirit of the Ocean*, B. & L. 336 ; *Hughes v. Sutherland*, 7 Q. B. D. 160 ; *The Volant*, 1 W. Rob. (Adm.) 383. As to liability, under 25 & 26 Vict. c. 63, s. 54, of master who is also owner, *The Obey*, L. R. 1 A. & E. 102 ; *The Cricket*, 5 Mar. Law Cas. N. S. 53. See per Kay, L.J., *The Queen v. Judge of City of London Court* (1892), 1 Q. B. 273, at 308 *et seq.*

⁴ *Ex parte Ferguson and Hutchinson*, L. R. 6 Q. B. 280 ; *The Mac*, 7 P. Div. 38, 126.

⁵ *Wilson v. Dickson*, 2 B. & Ald. 2 ; *The Empusa*, 5 P. D. 6.

⁶ *Glaholm v. Barker*, L. R. 2 Eq. 598, L. R. 1 Ch. 223.

⁷ "Improper navigation" is defined in *The Warkworth*, 9 P. D. 20, 145 ; *Good v. London Steamship Owners' Association*, L. R. 6 C. P. 563 ; *Wahlberg v. Young*, 45 L. J. C. P. 783 ; *Carmichael v. Liverpool Sailing Ship Mutual Indemnity Association*, 19 Q. B. D. 242 ; *Canada Shipping Company v. British Shipowners' Mutual Protection Association*, 22 Q. B. D. 729, affirmed 23 Q. B. Div. 342. "Negligent stowage" was held not to be "default in the management of the ship" in *The Ferro* (1893), P. 38.

⁸ *London and South-Western Railway Company v. James*, L. R. 8 Ch. 241 ; see also *s. c.* L. R. 7 Ex. 187 ; *The Normandy*, L. R. 3 A. & E. 152. In *Wahlberg v. Young*, 45 L. J. C. P. 783, damage to a tow by improper navigation of the tug is held within the section. Brett, J., added at 786 : "A mere breach of the towing contract would not bring the case within the 54th sec. of the Merchant Shipping Amendment Act, 1862, but I am of opinion that if there had been such an improper navigation as would bring it within that section, the case is not ousted out of that section because there has also been a breach of the towing contract."

⁹ *Chapman v. Royal Netherlands Steam Company*, 4 P. D. 157 ; *The Ettrick*, 6 P. D. 127 ; but see *The Khedive*, 7 App. Cas. 795. As to liability to interest beyond

steamship shall be her gross tonnage without deduction on account of engine room,¹ and the tonnage of a sailing ship shall be her registered tonnage."² Provided that there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use which is certified under the regulations scheduled to this act with regard thereto.³ The section also provides for the measurement of foreign ships.⁴

By a further sub-section of the same section,⁵ the owner of every sea-going ship or share therein shall be liable in respect of every such loss of life, personal injury, loss of or damage to vessels, goods, merchandise, or things as aforesaid, arising on distinct occasions, to the same extent as if no other loss, injury, or damage had arisen.

This liability is independent of the consideration that the ship is sunk,⁶ though in America, under the local statutes, the law seems otherwise.⁷ Cargo laden on board at the time of a collision is in

the £8 on tonnage, *The Northumbria*, L. R. 3 A. & E. 6. As to measuring ship constructed with a double bottom, *The Zanzibar* (1892), P. 233. The history of the limitation of liability in maritime collision is given by Lord Stowell in the *Douglas*, 1 Hagg. (Adm.) 109, at 120. The introduction of the principle is attributed to the Dutch. See also Abbott, *Merchant Ships* (13th ed.), 513-517.

¹ *The Franconia*, 3 P. D. 164; *The Palermo*, 10 P. D. 21; *The Umbilo* (1891), P. 118, distinguished in *The Pilgrim* (1895), P. 117. As to the construction to be put on this, see per Abbott, C.J., *Gale v. Laurie*, 5 B. & C. 156, at 163; *Chapman v. Royal Netherlands Steam Navigation Company*, 4 P. D. 157; overruled in *The Khedive*, 7 App. Cas. 795, where the section is explained at 800 by Lord Selborne, at 815 by Lord Blackburn, and at 824 by Lord Bramwell; *Coltman v. Chamberlain*, 25 Q. B. D. 328; and in America in *The North Star*, 106 U. S. (16 Otto), 17; *The Manitoba*, 122 U. S. (15 Davis), 97; *In re Morrison* 147 U. S. (40 Davis), 14. As to what ships it applies to, *The Warkworth*, 9 P. D. 20, 145; and in what situations, *The "Amalia"*, 1 Moo. P. C. C. N. S. 471. In a subsequent stage of this case, reported 34 L. J. (P. M. & A.) 21, Dr. Lushington says that in Admiralty "interest was given for this reason, namely, that the loss was not paid at the proper time," i.e., "from the time when the loss ought to have been paid for." The words of the quotation are from the report of the case in the note to *Straker v. Hartland* (1864), 5 N. R. 163, at 164; see *The Northumbria*, L. R. 3 A. & E. 6. See also the discussion as to this rule in *The Kong Magnus*, (1891) P. 232. The "*Amalia*" also decided that a limitation suit might be instituted and carried to a successful issue by a shipowner, without admitting his liability in the action. See the remark of Butt, J., *The Karo*, 13 P. D. 24, at 29. The Court may marshal assets: *The Victoria*, 13 P. D. 125. The point involved in *Mills v. Armstrong*, *The Bernina*, 13 App. Cas. 1, is of general legal concern, and not particularly applicable to the law of collisions on water. In *The London Steamship Owners' Insurance Company v. The Grampian Steamship Company*, 24 Q. B. Div. 663, the law was stated to be that in case of collision damage, there is one liability only, that of the less damaged to pay to the more damaged one-half of the difference, so that the owner of the more damaged is not entitled to recover upon an insurance effected by him against liability for damage to another vessel by collision with his vessel. For the effect of payment into Court of the £3 a ton, see *The Ettrick*, 6 P. D. 127.

² *The Andalusian*, 3 P. D. 182; *The John McIntyre*, 6 P. D. 200.

³ Sch. vi. *The Petrel* (1893), P. 320.

⁴ Also see ss. 77-87.

⁵ 57 & 58 Vict. c. 60, s. 503, sub-s. (3). See *The Rajah*, L. R. 3 A. & E. 539; *Union Steamship Company v. The Aracan*, *The American* and *The Syria*, L. R. 6 P. C. 127.

⁶ *The Normandy*, L. R. 3 A. & E. 152; *Brown v. Wilkinson*, 15 M. & W. 391.

⁷ *Parsons, Law of Shipping*, vol. ii. 120; *Norwich Steamboat Company v. Wright*, 13 Wall. (U.S.) 104.

no case liable,¹ though the freight on it may be ordered to be paid into court.²

Limitation of
£8 per ton.

The limitation of £8 per ton of the tonnage is in respect of damage "arising on distinct occasions."³ The test of what constitutes a distinct occasion was explained by Lord Esher, M.R.,⁴ not to be the time at which the damage occurred, but the consideration whether in the case of damage to two ships "both are the result of the same want of seamanship," and, "if they are not, the Act does not apply except as to each of them separately.

Seaworthiness
of ship to be
implied in
every contract
between owner
and seaman.

Here also may conveniently be noted the provision in The Merchant Shipping Act, 1894,⁵ that in every contract of service between the owner of a ship, and the master or any seaman thereof, and in every instrument of apprenticeship whereby any person is bound to serve as an apprentice on board any ship, an obligation to use all reasonable means to insure the seaworthiness of the ship shall be implied, notwithstanding any agreement to the contrary, as well as a further obligation to keep her in a seaworthy condition for the voyage she is undertaking.

Hedley v.
Pinkey & Sons'
Steamship
Company.

The meaning of the term seaworthiness in this enactment was sought to be extended in the case of *Hedley v. Pinkney & Sons Steamship Company*⁶ so as to be synonymous with safe in the interest of the preservation of human life; but both the Court of Appeal and House of Lords refused to accede to the argument that it included the result of carelessness on the part of master or crew causing loss of life, and held that the definition was no wider than that given by Parke, B., in *Dixon v. Sadler*,⁷ and illustrated by Lord Blackburn in *Steel v. State Line Steamship Company*.⁸

*Restitutio in
integrum.*

*Restitutio in integrum*⁹ is the leading maxim in cases of collision; and, where repairs are practicable, the rule followed by the Admiralty Courts in such a case is that damages assessed against the respondent shall be sufficient to restore the injured vessel to the condition in which she was when the injury was inflicted.¹⁰ This rule is elaborated in the United States case of the

¹ The *Victor*, Lush. 72; the "*Atlas*," 93 U. S. (3 Otto), 302.

² The *Leo*, Lush. 444; *Stewart v. Rogerson*, L. R. 6 C. P. 424. As to liability of tow for tug, see *ante*, 1272, *et seqq.*

³ Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 503, sub-s. (3).

⁴ The *Schwan*, The *Albano*, (1892) P. 419, at 439, following *The Creadon*, 5 Mar. Law Cas. N. S. 585.

⁵ 57 & 58 Vict. c. 60, s. 458; sec. 457 makes it a misdemeanour to send or attempt to send a British ship to sea in such unseaworthy state that the life of any person is likely to be endangered thereby.

⁶ (1892) 2 Q. B. 58, *affd.* in H. of L. (1894) App. Cas. 222.

⁷ 5 M. & W. 405.

⁸ 3 App. Cas. 72. See *ante*, 1252.

⁹ The *Northumbria*, L. R. 3 A. & E. 6, at 12, and *ante*, 1327. The *Black Prince*, Lush. 568, distinguished the "*City of Peking*," 15 App. Cas. 438.

¹⁰ The *Clyde*, Swa. (Adm.) 23; The *Gazelle*, 2 W. Rob. (Adm.) 279; see as to

"Atlas"¹ as follows:² "Satisfaction . . . for the injury sustained The Atlas. is the true rule of damages in a cause of collision, by which is meant that the measure of compensation shall be equal to the amount of injury received, and that the same shall be calculated for the actual loss occasioned by the collision, upon the principle that the sufferer is entitled to complete indemnification for his loss, without any deduction for new materials used in making repairs, as is prescribed in the law of marine insurance. Complete recompense for the injury is required; nor is the guilty party in such a case entitled to deduct from the amount of the damages any sum which the libellant has received from an underwriter on account of the same injury, the rule being that a wrongdoer in such case cannot claim the benefit of the contract of insurance if effected by the person whose property he has injured." This is also good English law, and is established by the cases, despite certain scruples of Brett, J., which we have already noted and considered.³

The Court of Appeal has determined that the liability of the owners of the ship which has occasioned loss of life to the crew of another vessel is limited to £15 on the registered tonnage.⁴ Amount of damage recoverable in respect of personal injury.

A further question was raised, whether the damages which could be claimed under Lord Campbell's Act (9 & 10 Vict. c. 93)⁵ by the widow or children of the seamen killed was limited to £30, by virtue of the operation of 17 & 18 Vict. c. 104, ss. 510-516, and 25 & 26 Vict. c. 63, ss. 54-56, for each man killed, whatever might be the actual damage sustained by the family.⁶ Lord Campbell's Act as affected by Merchant Shipping legislation. This was decided in the negative. The effect of the legislation on the matter is thus worked out by Lord Romilly, M.R., in *Glaholm v. Barker*:⁷ "Suppose the tonnage of the wrongdoing vessel to be

damages, Sir R. Phillimore's judgment in *The Halley*, L. R. 2 A. & E. 3, reversed on another point, L. R. 2 P. C. 193; *The Argentino*, 13 P. D. 61, 191, 14 App. Cas. 519.

¹ 93 U. S. (3 Otto), 302, where the English cases are reviewed.

² L. c. at 310.

³ *Ante*, 227.

⁴ *Glaholm v. Barker*, L. R. 1 Ch. 223; *London and South-Western Railway Company v. James*, L. R. 8 Ch. 241. When damage is done by a ship both to persons and goods, the ship is to be estimated at no less than £15 per ton, for the purpose of adjusting the compensation to be paid to claimants in respect of loss of life or personal injury; but where the only claimants are the owners of property which has been damaged, the ship is not to be estimated at more than her actual value, although loss of life or personal injury may in fact have occurred; yet where claimants of both kinds appear, the owners of property are entitled to have compensation marshalled so as to throw that for loss of life and personal injury primarily on the excess, if any, of the value at £15 per ton over the actual value of the ship: *Nixon v. Roberts*, 1 J. & H. 739.

⁵ *Ante*, 248.

⁶ See now Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 502-508. Ss. 507-513 of 17 & 18 Vict. c. 104, relating to the institution of proceedings by the Board of Trade for the recovery of damages in the case of loss of life or personal injury, and the procedure thereunder, are repealed by the Act of 1894, and are not re-enacted.

⁷ 35 L. J. (Ch.) 657, at 658; the passage cited in the text is better given than in the report, L. R. 2 Eq. 598, at 604. As to limitation of liability, see *Rankine v. Raschen*, 4 Rettie, 725.

100 tons, then the extent of the liability of the owners is £1500, and suppose 100 persons to be drowned by the fault of this vessel, the family of each person would get £15, that amount being clearly less than the damage actually sustained; but suppose two persons only were drowned, it would not therefore follow that the whole £1500 was to be divided amongst the families of each person so destroyed. It might be the opinion of a jury or a judge that the damage sustained by the loss of one of those persons did not exceed £200, whilst the damage sustained by the loss of the other amounted to £500; in that case these two sums would be the amount of the damages which the owner would have to make good; in other words, the damages were to be ascertained in the same way as if the liability of the owner was unlimited, and, when this had been done, the sum for which the owner was liable was to be applied in payment of the damages so ascertained if less than the amount of his liability; or it was to be distributed rateably amongst the claimants if the damages so ascertained exceeded the amount of his liability."

Limited
responsibility
of shipowners
in America.

In America also the law of limited responsibility of shipowners is now established, and covers the case of injuries to the person as well as that of injuries to goods and merchandise. This is put on the ground of encouragement to shipbuilding and of employment of ships in commerce, on which accounts the owners are not to be rendered liable beyond their interest in the ship and freight for the acts of the master and crew done without their privity or knowledge,¹ and is a statutory enactment. But in the celebrated judgment delivered in *The Rebecca*² it is affirmed that the law of England and America differed, apart from the statutes, in this respect from the general maritime laws of Europe. By the general maritime law the liability of owners for the wrongful acts of the master was always limited to the interest they have in the ship, so that by abandoning the ship and freight to the creditor they discharged themselves from all personal responsibility. In the law of France this was known as *contrât de pacotille*. The rule of the civil law, however, is *Omnia enim facta magistri debet præstare qui eum præposuit*.³ *Non autem ex omni causa prætor dat in exercitorem actionem, sed ejus rei nomine, cujus ibi præpositus fuerit, id est, si in eam rem præpositus sit*.⁴ *Aliquatenus culpæ reus est, quod opera malorum*

The Rebecca.

¹ *Bulter v. Boston Steamship Company*, 130 U. S. (23 Davis), 527; *The Scotland*, 105 U. S. (15 Otto), 24, where the exemptions and limitations of the American Act corresponding to the clauses above noticed were held to apply to foreign as well as domestic vessels. See also *Constable v. National Steamship Company*, 154 U. S. (47 Davis), 51, at 59.

² *Ware* (U. S. Dist. Ct.), 188.

⁴ D. 14, 1, 1, § 7.

³ D. 14, 1, 1, § 5.

*hominum uteretur, ideo quasi ex maleficio teneri videtur.*¹ The rule of the English common law is the same, but on the petition of merchants and shipowners it was established in England by various Acts of Parliament that the common law liability should be limited as we have seen.²

A ferry-boat has no right to cross a river in a dense fog with the knowledge that vessels are in her track or near thereto, and that there is any probability of an insufficient watch on any of them. If an accident happens, even without further negligence on the ferry-boat's part, her owners are liable, for they take all the responsibility incident to the course they adopt.³

Where damage is done by a vessel the property of the Crown the responsibility rests with the actual wrongdoer,⁴ and where a collision was caused by the commander of a Queen's ship anchoring too near a vessel in squally and tempestuous weather, he was condemned in the damage.⁵

¹ Inst. 4, 5, 3, D. 44, 7, 5, § 6.

² Abbott, Merchant Ships (13th ed.) 513-518.

³ The Lancashire, L. R. 4 A. & E. 198.

⁴ The Mentor, 1 C. Rob. (Adm.) 179, per Sir W. Scott, at 181: "The actual wrongdoer is the man to answer in judgment; to him responsibility is attached in this Court. He may have other persons responsible over to him; and that responsibility may be enforced. As, for instance, if a captain make a wrong seizure, under the express orders of an admiral, that admiral may be made answerable in the damages occasioned to the captain by that improper act; but it is the constant practice of this Court to have the actual wrongdoer held the party before the Court." The Athol, 1 W. Rob. (Adm.) 374, per Dr. Lushington at 381.

⁵ The Volcano, 2 W. Rob. (Adm.) 337.

CHAPTER VI.

TELEGRAPHS AND TELEPHONES.

THE duties of telegraph and telephone companies may conveniently be treated here in connection with the duty of carriers, though the relations arising out of them are not to be considered as a portion of the law of bailments.

Statutory law. The law in England relating to telegraphs is regulated by the Telegraph Act, 1868,¹ consolidated with the Telegraph Act, 1869.² By virtue of these Acts the Postmaster-General has the exclusive privilege of sending telegrams within the United Kingdom of Great Britain and Ireland, with the exception of—

Exceptions from the Postmaster-General's privileges.

1. Telegrams transmitted by a telegraph maintained or used solely for private use for the business of the owner.

2. Telegrams transmitted by a telegraph maintained for private use, and in respect of which no money or valuable consideration passes; that is, apparently, telegrams relating to the owner's friends sent gratuitously.

3. Telegrams licensed by the Postmaster-General.

4. Telegrams transmitted to or from any place out of the United Kingdom of Great Britain³ and Ireland.

Attorney-General v. Edison Telephone Company.

Attorney-General v. Edison Telephone Company⁴ decides that a telephone is a telegraph within the meaning of these Acts. In the judgment in that case Professor Stokes is quoted⁵ as saying: "If a single word is to be used to include both a telephone and a telegraph it must, in my opinion, be wide enough to cover every instrument which may ever be invented which employs electricity transmitted by a wire as a means for conveying information."

¹ 31 & 32 Vict. c. 110.

² 32 & 33 Vict. c. 73, extended 33 & 34 Vict. c. 88, which is amended 41 & 42 Vict. c. 76, ss. 10, 11; 48 & 49 Vict. c. 58.

³ Sec. 5 of 32 & 33 Vict. c. 73.

⁴ 6 Q. B. D. 244.

⁵ L. c. per Stephen, J., at 251.

An effect of the Telegraph Acts vesting telegraphs in the Postmaster-General is that no liability for negligence exists except against the person or persons actually in default.¹

Effect of the Telegraph Acts with regard to liability for negligence.

The exceptions from the provisions of the Acts, especially that which allows the Postmaster-General to license the transmission of messages, a privilege that has been most generally exercised in the case of telephones, and that which excludes telegrams transmitted to or from any place out of the United Kingdom, from the control of the Postmaster-General, require that the liabilities of telegraph companies, as they exist apart from the Acts, should be treated of.

The law in England and in America on the subject has very widely diverged. In England it has been established that the liability of telegraph companies arises entirely out of the contract between the company and the sender.² In America it has been equally clearly decided that the liability of a telegraph company depends on some principle much wider than the contract entered into with the sender.³ As to what that principle is there is considerable difference of opinion.

Divergence of the English and American law.

"Since," says one learned writer,⁴ "a telegraphic company, wielding a power for good or evil, only transcended by railway corporations, is eminently within the scope of the rule *sic utere tuo ut alienum non lædas*," therefore a telegraph company should be liable apart from contract. But the maxim vouched is, after all, not of universal application; and there seems a very marked difference between those acts in the management of property which, when done by me, work harm to my neighbour (and even these are not universally actionable; for instance, interfering with his prospect), and those acts which, as done by me, are innocuous, but which may become injurious if my neighbour pleases to make them so by using them for his own end.

Dr. Wharton's view.

Again, telegraph companies are said to be liable as common carriers. "We entertain no doubt," say the authors of a recent American treatise on the subject,⁵ "that they [telegraph companies] are common carriers of messages, subject to all the rules which, in their nature and by fair analogy, are applicable to all cases of

Messrs. Shearman and Redfield's view.

¹ See *ante*, 286.

² *Dickson v. Renter's Telegraph Company*, 3 C. P. Div. 1, affirming 2 C. P. D. 62; *Playford v. United Kingdom Electric Telegraph Company*, L. R. 4 Q. B. 706.

³ *Shearman and Redfield, Negligence* (4th ed.), §§ 528 *et seqq.* Wharton, *Negligence* (2nd ed.), §§ 750 *et seqq.*; *Redfield, Carriers*, Part IV., *Telegraph Companies*, §§ 541-571.

⁴ Wharton, *Negligence* (2nd ed.), § 758.

⁵ *Shearman and Redfield, Negligence*, (4th ed.), § 535. This view is powerfully combated by Hunt, J., in *Leonard v. New York &c., Telegraph Company*, 41 N. Y. 544, at 571. See *Breese v. United States Telegraph Company*, 45 Barb. (N. Y.) 274, at 292, affirmed 48 N. Y. 132; *Griunell v. Western Union Telegraph Company*, 113 Mass. 299, at 301.

common carriers." They preface this with the statement: "of course they are not subject to the stringent liability of goods carriers as insurers."

Principle
stated by
Holt, C.J.

The position of telegraph companies, however, seems more readily referable to a wider principle extending through all the more common and useful employments, and which is thus stated by Holt, C. J.:¹ "If a man takes upon him a public employment, he is bound to serve the public as far as the employment extends; and for refusal an action lies, as against a farrier for refusing to shoe a horse, against an innkeeper refusing a guest when he has room, against a carrier refusing to carry goods when he has convenience, his waggon not being full. . . . So an action will lie against a sheriff for refusing to execute process;" and is not to be set down to their being included in the class of common carriers, with an exemption (apparently quite arbitrary) from some of the most onerous incidents of the position.

No analogy
between a con-
signment of
goods through
a carrier and
the trans-
mission of a
telegram.

The objection of the Queen's Bench to considering telegraph companies as common carriers, that there is no analogy between a consignment of goods through a carrier and the transmission of a telegram, even apart from its authority, is of no little cogency. "We cannot see," say the Court, "how the person to whom a telegraphic message is sent can be said to have a property in the message, any more than he could have if it had been sent orally by the servant of the sender."²

Messrs. Scott
and Jarnagin's
view.

Once more, telegraph companies are said to be bailees, and the receipt of messages a bailment;³ but a bailment implies the delivery of property,⁴ and that which the company receives is never delivered.

La Grange v.
South-Western
Telegraph
Company.

They are also said to make themselves the agents of both the sender and the receiver of messages by a profession "to transmit for hire messages for individuals, and to deliver faithfully to others such messages as are entrusted to them."⁵ This view is refuted in *Bigelow's Leading Cases on Torts*.⁶ The learned author of that

¹ *Lane v. Cotton*, 1 *Ld. Raym.* 646, at 654. If this be so, a considerable amount of rhetoric in *Shearman and Redfield, Negligence* (4th ed.) § 535, becomes purely ornamental.

² *Playford v. United Kingdom Telegraphic Company*, *L. R.* 4 *Q. B.* 706, at 714. See *Holmes, The Common Law*, 203. See, too, per *Bigelow, C.J.*, in *Ellis v. American Telegraph Company*, 95 *Mass.* 226, at 231: "Under this provision, an owner or manager of such a line becomes to a certain extent a public servant or agent. He is bound, under a heavy penalty, to the due and faithful execution of the service which he holds himself out as ready to perform. He cannot refuse to receive and forward despatches; nor can he select the persons for whom he will act. He cannot transmit messages at such times or in such order as he may deem expedient. He is required to send them for every person who may apply, at a usual or uniform tariff or rate without any undue preference, and according to established regulations applicable to all alike."

³ *Scott and Jarnagin, Law of Telegraphs*, § 95.

⁴ *Ante*, 879.

⁵ *La Grange v. South-Western Telegraph Company*, 25 *La. Ann.* 383, 384. See *New York, &c., Telegraph Company v. Dryburgh*, 35 *Pa. St.* 298, at 303.

⁶ At 623 *et seq.*

work favours two other hypotheses for fixing the position of telegraph companies: "Their liability for negligent mistakes (and perhaps delays) arises either on the ground of a misrepresentation of agency or on the broad principle that a person must so conduct his business as not to injure others." As to the first of these, in England at least, it is clear that no action is maintainable for a mere untrue statement, although acted on to the damage of the person to whom it is made; unless that statement is false to the knowledge of the person making it, and made with the view of its being acted on.¹ As to the second, in the unlimited way in which it is expressed, there is no such principle;² and the act of the company is not injurious without an intervening act of another to give it force and effect.³

Dr. Bigelow's suggestions.

From this elementary difference in the estimate of the position of telegraph companies flows a variety of consequences that greatly differentiate the law in the two countries.

In England, the liability of telegraph companies being based upon contract alone, falls under the rule prevailing in cases where a person undertaking the performance of work requiring skill, is held to owe a duty to the person employing them, but not to third persons, though the whole reason and benefit of the employment may be on their account.⁴ So far as third persons go, by the law of England it is "plain that all they undertake to do is to deliver a message from the person who employs them, and that they perform the part of

English rule as to contract between the company and the sender same as American.

¹ *Pasley v. Freeman*, 2 Sm. L. C. (9th ed.), 74. The English rule on misrepresentation of agency is thus stated by Lord Esher, M.R., in *Firbank's Executors v. Humphreys*, 18 Q. B. Div. 54, at 60.: "Where a person by asserting that he has the authority of the principal induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is personally liable for the damage that has occurred." An action will not lie for a representation not intended by the defendant to induce the plaintiff to act on it: *Swift v. Winterbotham*, L. R. 8 Q. B., at 253; nor if intended to induce the plaintiff to act on it, if the defendant believed it to be true: *Evans v. Collins*, 5 Q. B. 804, *Richardson v. Silvester*, L. R. 9 Q. B. 34. To constitute a right of action the misrepresentation must be made knowingly or without belief in its truth, or recklessly without caring whether it is true or false: *Derry v. Peek*, 14 App. Cas. 337. For the distinction between the case of a telegraph company wrongly transmitting a message, and the principle of estoppel asserted in *Collen v. Wright*, 7 E. & B. 301, see per Brett, L.J., *Dickson v. Reuter's Telegram Company*, 3 C. P. Div. 1, at 8.

² At least by the law of England, *Alton v. Midland Railway Company*, 19 C. B. N. S. 213. *Ante*, 211, n.², and 1181. See also *Dickson v. Reuter's Telegraph Company*, 2 C. P. D. 62, at 70.

³ Dr. Bigelow reasons as follows at 626: "Now the telegraph is resorted to only in cases of importance and urgency; so that the very fact of presenting a message for transmission indicates that it concerns a matter of importance. The company cannot, therefore, fail to know that a mistake in transmission will be likely to produce damage to the receiver by causing him to do that which otherwise he would not do. Knowing, then, the probably evil consequences of transmitting an erroneous message, they owe a duty to the receiver of refraining from such an act, and if (by negligence) they violate this duty they must, on plain legal principles, be liable for the damage produced," &c. In England probably the major premiss of this reasoning would be called in question.

⁴ *Robertson v. Fleming*, 4 Macq. (H. L. Sc.) 167, at 177.

mere messengers; *prima facie*, therefore, their only contract is with the person who employs them to send and deliver a message."¹

Telegraph companies not bound to warrant the correct transmission of message;

Telegraph companies are not bound to warrant the correct transmission of the messages they undertake to send. The nature of their business, dependent upon delicate apparatus, liable to disarrangement by atmospheric or electrical conditions and disturbances, renders the exaction of such a liability extremely onerous where there is any wide distribution of telegraphic agencies.²

but bound to fidelity and care.

While the law has not seen fit to fix telegraph companies with an universal duty, nor with one exacting more than ordinary care, they are yet bound to fidelity and care in the exercise of the business they undertake; and are liable for the consequences of carelessness or negligence in the conduct of it to those with whom they have contracted.³ The standard applicable is that of the due and reasonable care that persons of average skill in the business that they have undertaken, and in similar circumstances, use in their ordinary affairs.⁴

Assessment of damages.

In the assessment of damages the rule in *Hadley v. Baxendale*⁵ applies and those damages may be recovered, and only those, which can reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.⁶ So far there is no difference between the American and the English law.

English law as to the relation between the company and the receiver.

Playford v. United Kingdom Telegraph Company.

When, we come to consider the position of the receiver of a telegram a divergence becomes apparent. In *Playford v. United Kingdom Telegraph Company*⁷ the Court of Queen's Bench were of opinion that at common law the position of a receiver of a telegraphic message is not distinguishable from that of a person receiving a message orally from the servant of the sender, against whom he would have no right of action in the absence of fraud; and this rule was adopted by the Court of Appeal in *Dickson v. Reuter's Telegraph Company*.⁸

Canadian decision, *Feaver v. Montreal Telegraph Company.*

If the receiver is the real principal and the sender is his agent, it has been decided in Canada that the telegraph company

¹ Per Brett, L.J., *Dickson v. Reuter's Telegram Company*, 3 C. P. Div. 1 at 7.

² Per Denman, J., *Dickson v. Reuter's Telegraph Company*, 2 C. P. D. 62, at 69.

³ *Kinghorne v. Montreal Telegraph Company*, 18 Can. Q. B. 60, at 64.

⁴ *Playford v. United Kingdom Electric Telegraph Company*, L. R. 4 Q. B. 706, at 714: "The obligation of the company to use due care and skill in the transmission of the message." *Ellis v. American Telegraph Company*, 95 Mass. 226, at 233.

⁵ 9 Ex. 341, see *ante*, 116. The American law of damages is treated, *Western Union Telegraph Company v. Hall*, 124 U. S. (17 Davis), 444; *Western Union Telegraph Company v. Hyer*, 1 Am. St. R. 222; and see note at 228, on English carrier's authorities.

⁶ *Sanders v. Stuart*, 1 C. P. D. 326.

⁷ L. R. 4 Q. B. 706; followed in Canada, *Feaver v. Montreal Telegraph Company*, 23 Upp. Can. C. P. 150.

⁸ 3 C. P. D. 1.

who undertake the transmission of the message are liable for its miscarriage. "It would be a startling doctrine to persons engaged in commercial transactions," says the learned Judge who delivered the judgment of the Court in the case referred to,¹ "to be told that no action can be maintained against a telegraph company for negligence, except the person injured was himself the party who actually took the message to the company's office." The case is then put of a merchant instructing his clerk at a distance to telegraph the state of the market to him, and through the negligence of the telegraph company erroneous information being transmitted whereby the merchant sustains loss. If, it is argued, the principle contended for is not good, then the clerk can maintain no action, because he suffers no loss; nor the merchant, because the contract is with the clerk. An action was therefore held to lie. This decision seems in accord with *Playford v. United Kingdom Telegraph Company*,² where the case of agents is expressly excluded, and the relation of the parties there is said to be "that of sellers and buyers, and not that of principal and agents."

In one well-known English case³ it was sought to render the sender liable for the mistake of the telegraph clerk. The defendant wrote a message ordering three rifles. The telegraph clerk telegraphed the word "the" for "three." The plaintiffs had previously been negotiating for the sale of fifty rifles; accordingly they sent fifty. The defendant declined to take more than three. Plaintiff then brought his action for the price of fifty, but was held disentitled to recover the price of more than three, on the ground that the Post Office authorities were only agents to transmit the message in the terms in which the sender delivered it. "The defendant cannot be made responsible because the telegraph clerk made a mistake in the transmission of the message."⁴ Henkel v. Pape.

In America the receiver has an action against the telegraph company where there is negligence in the transmission of the message, and loss results. This is on the principle that where two persons make a contract expressly for the benefit of a third, such third person may sue upon it.⁵ The validity of any such reason seems extremely doubtful, even admitting the soundness of the legal proposition on which it is based;⁶ since it must be of frequent American law.

¹ Galt, J., in *Feaver v. Montreal Telegraph Company*, 24 Upp. Can. C. P. 258, at 260.

² L. R. 4 Q. B. 706.

³ *Henkel v. Pape*, L. R. 6 Ex. 7, followed in *Verdin v. Robertson*, 10 Macph. 35.

⁴ *Per Kelly, C.B., l. c.* at 9.

⁵ *Shearman and Redfield, Negligence* (4th ed.), § 543.

⁶ *Pollock, Contracts* (6th ed.), 199, says: "The rule is now settled that a third person cannot sue on a contract made by others for his benefit, even if the contracting parties have agreed that he may." *Tweddle v. Atkinson*, 1 B. & S. 393; *Gandy v. Gandy*, 30 Ch. Div. 57, *Ante*, 349. Sir Frederick Pollock adds at 202: "A different opinion is widely accepted in America, but there does not seem to be any general agreement as

Woodward, J.,
in New York
and Washing-
ton Printing
Telegraph
Company v.
Dryburg.

occurrence that the sender of a telegram not only does not expressly make a contract for the benefit of a third person, but in sending his telegram does not consider the probability of benefit accruing. A better ground seems to be that which is alleged by Woodward, J., in the leading case of *New York and Washington Printing Telegraph Company v. Dryburg*.¹ "The wrong, then, of which the plaintiff complains, consisted in sending him a different message from that which they had contracted with Le Roy to send. That it was wrong is as certain as that it was their duty to transmit the message for which they were paid. Though telegraph companies are not, like carriers, insurers for the safe delivery of what is entrusted to them, their obligations, as far as they reach, spring from the same sources—the public nature of their employment and the contract under which the particular duty is assumed." Best of all, if true in fact, is that advanced in argument in *Playford v. United Kingdom Telegraph Company*,² that liability to third parties is imposed by the terms of the American statutes.³ Whatever the reason for the conclusion, the American law seems settled, that in case of negligence or wrong the telegraph company is liable to the addressee where a message is delayed,⁴ or is delivered in an altered form, and where it is not delivered at all, and also when it sends a forged message without proper inquiry.⁵ "It follows that in case of negligence or wrong, the company is liable to the addressee where a message is delayed or is delivered in an altered form, and where it is not delivered to him at all."⁶

Conditions
on which
telegrams
are sent.

The conditions on which telegraph companies send their messages have also been the subject of conflicting decisions in England and America.

MacAndrew
v. Electric
Telegraph
Company.

The English law is expressed in *MacAndrew v. Electric Telegraph Company*.⁷ Defendants' private Act provided for the sending and receiving of messages for all persons alike,

to the limits of third persons' rights." And he has a note: "See the *American Law Review*, April 1881, Mr. Wald's note here in American edition, and 'The right of a third person to sue upon a contract made for his benefit,' by Mr. E. Q. Keasbey, *Harv. Law Rev.* viii. 93, maintaining that 'what is called the prevailing American rule is not in fact a general rule of law,' and the authorities are to be explained on special grounds."

¹ 35 Pa. St. 298, at 302. In the same case it is said to be "settled upon abundant authority that incorporated companies may be sued in their corporate character for damages arising from neglect of duty, and for trover; and a corporation is liable in tort for the tortious act of its agent though the appointment of the agent be not under seal, if the act be done in the ordinary service." For this last proposition, *Smith v. Birmingham Gaslight Company*, 1 A. & E. 526, is cited.

² L. R. 4 Q. B. at 712.

³ This was said with reference to the States of New York, Pennsylvania, and Michigan.

⁴ *Gulf, & Co. Railway Company v. Levy*, 46 Am. R. 269, 278.

⁵ *Elwood v. Western Union Telegraph Company*, 45 N. Y. 549.

⁶ *Shearman and Redfield, Negligence* (4th ed.), § 543, citing cases.

⁷ (1855) 17 C. B. 3.

without favour or preference, subject, amongst other things, "to such reasonable regulations as may be from time to time made or entered into by the company." The plaintiff sent a message to defendants' office, which was received by defendants subject to a condition that they would not "be responsible for mistakes in the transmission of unrepeatd messages from whatever cause they may arise." In sending the message the word "Southampton" was by mistake substituted for "Hull." The plaintiff, the sender, who did not have the message repeated, sued for damages caused by the mistake. The question was whether the regulation was a reasonable one.

It was pointed out by the Court that it was perfectly immaterial whether the regulation was under the powers of the Act, or whether it was a condition limiting liability under the common law, since in either event the only question would be as to the reasonableness of it. As to this, "I see no reason," said Jervis, C.J.,¹ "why the company should not be allowed to avail themselves of the same sort of protection that other persons in a similar position are by law entitled to do, by limiting their liability by fair and reasonable conditions, notice of which is duly brought home to the parties contracting with them." Willes, J.,² adds: "The repetition of a message necessarily imposes more labour upon the party sending it, and therefore it is but reasonable that that extra labour should be paid for. And it is also reasonable that the company should be paid for taking upon themselves the risk of insuring the transmission against those accidents which are necessarily incident to a business of this sort. I think it is obviously reasonable that a man who requires the company to take upon themselves either a greater amount of labour or a greater amount of risk should pay them accordingly." The analogy suggested by the Chief Justice is obviously between the conditions which are reasonable in the case of common carriers. These have been already discussed at length,³ and the conclusions arrived at will hold good in the discussion of similar questions relating to telegraphs.

In America the position of a telegraph company is likened in many of the cases to that of a common carrier, and we have already seen that the law as to carriers differs in several respects from the law in this country.⁴ In the case just cited the decision of the American Courts would have been different from the actual decision in the case; since they forbid the limitation of a carrier's liability in any other way than by special contract for valuable

¹ *L. c.* at 14.
² *Ante*, 1125.

³ *L. c.* at 16.
⁴ *Ante*, 1085.

consideration,¹ and even then subject to restrictions not imposed in England.²

Law in
Massachusetts.

In Massachusetts, however, it is held³ that the telegraph companies may lawfully prescribe reasonable rules and regulations for the management of business, or establish special stipulations for the performance of services, which if made known to those with whom they deal, and directly or by implication assented to by them, will operate to abridge their general responsibility at common law, and to protect them from being responsible for unusual hazards incident to particular kinds of business. The Courts, nevertheless, except the liability for fraud or "gross negligence" of the principal or his servants and agents.⁴ Thus, where the plaintiff sent a signed message on a form of the defendants' which had printed on it certain conditions that limited their liability, he was held to be bound by the conditions, although he had not in fact read them.⁵ In a subsequent case in the same State,⁶ the condition was "it is agreed between the sender of the following message and this company that the said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any unrepeatd message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same." A message was detained and ultimately brought back undelivered by the messenger. On an action being brought for negligence in the carriage of the message, the Court held that there was no principle of public policy which should prevent the company from stipulating against responsibility for such negligence beyond a fixed amount, unless for reasonable compensation. "The only negligence shewn in this case was an unexplained delay in delivering the message on the part of the messenger boy, to whom it was, after its receipt, entrusted for delivery." "But the negligence of the messenger boys in delivering messages was plainly

¹ *E.g.*, *Smith v. New York Central Railroad Company*, 24 N. Y. 222.

² *Railroad Company v. Lockwood*, 17 Wall. (U. S.) 357; *Liverpool Steam Company v. Phenix Insurance Company*, 129 U. S. (22 Davis), 397; *Cole v. Goodwin*, 19 Wend. (N. Y.) 251; *M'Kinney v. Jewett*, 24 Hun (N. Y.) 19. See *Camp v. Western Union Telegraph Company*, 1 Metc. (Ky.), 164, referred to by Redfield, *Carriers*, § 557, as a case where "the rule of responsibility of telegraph companies seems to be as correctly laid down" as in any other.

³ The state of the American authorities is shewn in *Hart v. Western Union Telegraph Company*, 56 Am. R. 119, and note at 124; also *Aiken v. Western Union Telegraph Company*, 58 Am. R. 210; *Ayer v. Western Union Telegraph Company*, 79 Me. 493, 1 Am. St. R. 353.

⁴ *Ellis v. American Telegraph Company*, 95 Mass. 226, at 234: "Of course, a party cannot in such way protect himself against the consequences of his own fraud or gross negligence, or the fraud or gross negligence of his servants or agents."

⁵ *Grinnell v. Western Union Telegraph Company*, 113 Mass. 299. *Cp. Breece v. United States Telegraph Company*, 48 N. Y. 132.

⁶ *Clement v. Western Union Telegraph Company*, 137 Mass. 463.

contemplated by the parties, when they entered into the stipulation."¹

It will be gathered from what has gone before that the plaintiff had the alternative of paying the additional fee of half the price of the telegram, which was not disputed to be not more than a reasonable price for the services rendered, and having the message repeated with the safeguard of an insurer's liability attaching to the company; or of paying the lesser sum, which he actually paid, on the more onerous terms; and that he chose the latter alternative, to which the Court's decision held him bound. This apparently eminently reasonable decision is commented on as follows in a well-known American text-book: "This case stands alone, and we think it would be difficult to support it by any sound reasoning. But Massachusetts has always enjoyed a 'bad pre-eminence' in matters of judicial decisions affecting the interests of corporations and employers."²

Questions sometimes arise as to the liability of several connecting companies in respect of a message received by one to be transmitted over the connected lines. Here, again, the law as developed in the case of common carriers is applicable, and has been already considered.³ In America the rule seems to be that the company actually in fault is liable to the injured party, whether sender or receiver, although he has no direct dealings with them; while the presumption is against the liability of the telegraph company first receiving the message for the negligence of connecting lines. If the company first receiving the message contracts to transmit the message to its destination, it is liable for the negligence of all connecting lines.⁴

¹ *L. c.* per Morton, C. J., at 446.

² Shearman and Redfield, *Negligence*, (4th ed.), § 555, note 3.

³ For "sound reasoning" reference may be had to *Manchester, Sheffield, and Lincolnshire Railway Company v. Brown*, 8 App. Cas. 703, especially per Lord Bramwell, at 716 *et seqq.* What the character of the "pre-eminence" of the Courts of Massachusetts is need not occupy us here. At least, no such decisions as *Thompson v. Western Union Telegraph Company*, 54 Am. R. 644, or *Stuart v. Western Union Telegraph Company*, 59 Am. R. 623, are to be looked for there. As to what is a "reasonable condition" in these telegraph cases, see *Western Union Telegraph Company v. McGuire*, 54 Am. R. 296. There is a collection of cases that will well repay reference to them, on reasonable and unreasonable conditions, Stroud, *Judicial Dictionary*, *sub voc.* "Reasonable."

⁴ *Ante*, 1129.

⁵ Shearman and Redfield, *Negligence* (4th ed.), § 544; *La Grange v. South-Western Telegraph Company*, 25 La. Ann. 383; *Leonard v. New York Telegraph Company*, 41 N. Y. 544; *Baldwin v. United States Telegraph Company*, 45 N. Y. 744. The American law as to cipher despatches is discussed at length in *Daughtery v. American Union Telegraph Company*, 51 Am. R. 435. See also *Western Union Telegraph Company v. Fatman*, 54 Am. R. 877; *Western Union Telegraph Company v. Hyer*, 1 Am. St. R. 222; and *Western Union Telegraph Company v. Wilson*, 37 Am. St. R. 125, where the damages recoverable for failure to transmit and deliver a message written in unexplained cipher are said to be no more than nominal. In *Western Union Telegraph Company v. Carter*, 34 Am. St. R. 826, it was contended, though unsuccessful,

Decision considered.

Messages transmitted over various lines.

American authority for the proposition that the person who selects the telegraph must bear loss, as between him and the receiver, arising from errors in transmission.

There is an American authority¹ for the proposition that as between sender and receiver of telegrams the person who selects the telegraph as a means of communication must bear any loss occasioned by errors in transmission on the part of the telegraph company. This proposition is supported by the assumption that "if an agent receive instructions by telegraph from his principal, and in good faith act upon them as expressed in the message delivered him by the company, it would seem he ought to be held justified, though there were an error in the transmission."

Criticised.

Assuming a telegraph company to stand in the position of an intermediary merely—a messenger—as it has been held they do in England,² or even of a special agent who misconstrues his authority and that the message to the ultimate agent has been misdelivered, the principal would not be liable for an act that he did not authorize, though done in assumed obedience to his instructions.³ On the other hand, if the telegraph company occupy any position peculiar to themselves, first the position should be defined and then the consequences flowing from it should be deduced, not assumed.

Principle enunciated.

Setting this analogy aside, the principle enunciated is as follows: "It is evident that in case of an error in the transmission of a telegram, either the sender or receiver must often suffer loss. As between the two, upon whom should the loss finally fall? We think the safer and more equitable rule, and the rule the public can most easily adapt itself to, is, that, as between sender and receiver, the party, who selects the telegraph as the means of communication, shall bear the loss caused by the errors of the telegraph. The first proposer can select one of many modes of communication, both for the proposal and the answer. The receiver has no such choice, except as to his answer. If he cannot safely act upon the message he receives through the agency selected by the proposer, business must be seriously hampered and delayed. The use of the telegraph has become so general, and so many transactions are based on the words of the telegram received, any other rule would now be impracticable."

It is difficult to believe that this doctrine, which seems very readily to admit of application to the case of undelivered letters,

fully, that damages for the non-delivery of a message announcing the death of a person should include a sum for mental anguish caused by the manner and place of his burial, and for the expenses of exhuming the body.

¹ *Ayer v. Western Union Telegraph Company*, 79 Me. 493, 1 Am. St. R. 353.

² Per Lush, J., in *Playford v. United Kingdom Telegraph Company*, L. R. 4 Q. B. 706, at 714.

³ *Smout v. Ilbery*, 10 M. & W. 1; *Story, Agency* (9th ed.), § 264 and note; *Thomson v. Davenport*, and notes, 2 Sm. L. C. (9th ed.), 395.

⁴ 79 Me. at 499.

will find acceptance in any other State than that of its nativity. It seems specially adapted to produce circuitry of action. It assumes that where one of two parties suffers loss there must be some legal method of shifting it upon the other: that the receiver of a telegram may act on it, without troubling himself to verify its authenticity; that the sender is liable for a mistake made without negligence, and not merely for negligence of the telegraph company in making a mistake; and that, consequently, the right of the receiver against the sender is greater than any right of the sender against the telegraph company, who would at least be under no liability to the sender where the error in transmission is caused by act of God, even if the analogy of the carrier's liability is the correct one.

The Maine Court impose two limitations on their rule: first, the receiver must have acted in good faith; and secondly, the message must be actually sent, not forged.¹

¹ As to liability on a forged message, see *Elwood v. Western Union Telegraph Company*, 45 N. Y. 549. There is a long note on the Law of the Telephone, to *Central Union Telephone Co. v. Falley*, 10 Am. St. R. 114, at 128-136. The history of the invention of the electric telegraph is given in *O'Reilly v. Morse*, 15 How. (U. S.) 62.

BOOK VI.
SKILLED LABOUR.

BOOK VI.

SKILLED LABOUR.

CHAPTER I.

SKILLED LABOUR.

GENERALLY.

WE have already incidentally considered the subject of skilled Hiring of skill. labour under the head of Bailments. It was there pointed out that there are many relations not properly to be treated under that heading, since they involve no actual bailment of goods, and are merely a hiring of care, experience, or skill. These cases we now proceed generally to deal with,¹ reserving any special relations for independent consideration; and bearing in mind that the general principles laid down are not applicable merely to the relations immediately dealt with, but that they hold good in the matter of work done upon bailments as well.

The most general rule applicable to all skilled labourers is General rule. *Spondet peritiam artis et imperitia culpæ adnumeratur*, or *Spondet diligentiam gerendo negotio parem*.² A person holding himself out to do certain work, impliedly warrants his possession of skill reasonably competent for its performance.³ If he have not that skill he is liable as for negligence.

This rule is illustrated by *Jenkins v. Betham*,⁴ a case where Jenkins v. Betham. knowledge collateral to the special professional knowledge directly

¹ The subject is well treated, though with some variations from what is advanced in the text, in the American case of *Leighton v. Sargent*, 27 N. H. 460.

² Inst. 4, 3, 7; D. 9, 2, 7; D. 9, 2, 8; D. 9, 2, 27, § 29; D. 50, 17, 132; Story, *Bailm.* § 433; Trayner, *Latin Maxims* (2nd ed.), 239, 570; Bell, *Principles of the Law of Scotland* (9th ed.), 141-155. *Ante*, 36, and 947.

³ *Harmer v. Cornelius*, 5 C. B. N. S., 236, per Willes, J., at 246; *Duncan v. Blundell*, 3 Stark. (N. P.) 6, per Bayley, J., at 7: "Where a person is employed in a work of skill the employer buys both his labour and his judgment; he ought not to undertake the work if it cannot succeed, and he should know whether it will or not." *Gheen v. Johnson*, 90 Pa. St. 38, at 47; *Leighton v. Sargent*, 27 N. H. 460.

⁴ 15 C. B. 168, distinguished in *Pappa v. Rose*, L. R. 7 C. P. 32, 525. *Oliver v. Court*, 8 Price (Ex.) 127, may be referred to for the position of a land surveyor.

involved in doing the work undertaken was required—namely, a knowledge of law by country surveyors dealing with ecclesiastical dilapidations. The jury were asked to say on the evidence whether such knowledge could reasonably be expected from country surveyors and valuers. The question put to them was whether the defendants undertook to supply more skill than ordinarily current in the country at large, and whether they were to bring to bear the knowledge that might be looked for in a lawyer or in a person who lives near the sources of knowledge? At the same time they were cautioned that the defendants could not be expected to supply minute and accurate knowledge of the law. A verdict being given for the defendant, a new trial was moved for, and the Court, while approving the method in which the judge (Parke, B.) had placed the matter before the jury, allowed the application; because “we think¹ that, under the circumstances, they (the defendants) might properly be required to know the general rules applicable to the valuation of ecclesiastical property, and the broad distinction which exists between the cases of an incoming and an outgoing tenant, and an incoming and an outgoing incumbent.”

General rule.

This decision points to the necessity that a person professing to act in a matter requiring skill should be conversant with the general principles of law applicable to his profession, and with the methods of practice of most ordinary occurrence, even though knowledge outside the actual scope of his profession is involved. A professional acquaintance with the refinements of the subject is not, however, required. This is expressed by Tindal, C.J.:² “Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill. There may be persons who have higher education and greater advantages than he has, but he undertakes to bring a fair, reasonable, and competent degree of skill.”

Stated by
Tindal, C.J.

Degree of skill
to be expected.

The degree of skill requisite is such as may be expected in the circumstances of time and place from an average person in the profession—one neither specially gifted nor extraordinarily dull. Where this reasonable amount of information and skill proportioned to the duties that are undertaken is found, there is no

¹ *L. c.* per Jervis, C.J., delivering the judgment of the Court, at 189.

² *Langhieu v. Phipps*, 8 C. & P. 475, at 479. “Profession of a skilled employment,” says Dr. Hare, “raises a presumption of competence in the employment.” *Contracts*, 155.

liability for errors of judgment in the application of knowledge. Each case must depend on its own circumstances; with the paramount consideration that when an injury has been sustained that could not have arisen unless from the absence of reasonable skill or diligence, then there is liability.¹

An illustration of this is found in the Scotch case of *Clydesdale Bank v. Beatson*.² A teller in the plaintiff bank was sued for £900 on the ground that he had failed to account for money to that amount entrusted to him in the course of the business of the bank. The question was whether the loss was through an accident occurring where ordinary care and diligence were exercised, or caused through the absence of care and diligence. The Court were of opinion that the loss occurred through the defendant giving a parcel containing ten £100 notes in mistake for one of five £20 notes in change for a £100 note to a person unknown to him, and that this constituted gross negligence on his part. The rule of responsibility applied was that, "in contracts reciprocally beneficial, the care of a man of ordinary prudence is required, *culpa levis* will ground responsibility."³ It was assumed in favour of the defendant that the *onus* was on the pursuers to prove more than the mere possession of the money and failure to account; though the decision does not go the length of establishing this as a proposition of law.⁴

*Clydesdale
Bank v.
Beatson.*

Under the rule of diligence now being considered professional men of all classes, equally with skilled artisans,⁵ are comprehended —lawyers, physicians, engineers, machinists, shipmasters, builders, brokers,⁶ patent agents, and the rest.⁷

Who are
comprehended
under the rule.

Bell⁸ in his Commentaries suggests some tests to indicate the range of considerations that apply to determine what is negligence by a skilled agent. The following propositions embody a portion of what there appears (the illustrations of the application of the principles being omitted):

Test sug-
gested by Bell
in his
Commentaries.

First, where a specific act is ordered to be done, it must be done according to rule; neither neglected nor unskilfully done.

¹ *Hart v. Frame*, 6 Cl. & F. 193. Cp. per Lord Blackburn, *Speight v. Gaunt*, 9 App. Cas. 1, at 17.

² 10 Rettie 38. Cp. *Melville v. Doidge*, 6 C. B. 450.

³ 10 Rettie, per Lord Craighill, at 90, citing Bell, *Principles of the Law of Scotland*, § 234.

⁴ Bell, *Principles of the Law of Scotland*, § 234. See, however, Story, *Bailm.* (8th ed.) § 410a. *Ante*, 907.

⁵ See D. 9, 2, 27, § 29.

⁶ "A broker for sale is a person making it a trade to find purchasers for those who wish to sell, and vendors for those who wish to buy, and to negotiate and superintend the making of the bargain between them." Blackburn, *Contract of Sale*, 81 (2nd ed. at 78) quoted by Hannen, J., in *Mollett v. Robinson*, L. R. 7 C. P. 84, at 97, and by Mellor, J., *Hollins v. Fowler*, L. R. 7 H. L. 757, at 774.

⁷ *Lee v. Walker*, L. R. 7 C. P. 121, approved *Ex parte Bailey*, L. R. 8 Ch. 60.

⁸ 1 Bell, Comm. (7th ed.) 489. *Ante*, 925 and 988.

Secondly, where the act to be done may be safely done by following a known method, which is the plain and common rule of the profession, the professional man is responsible if he neglects to follow the method.

Thirdly, where an operation to be performed is complicated and difficult, a professional man may err and be unsuccessful, and yet not responsible if he fairly exert the best of his judgment.

Judgment of
Tindal, C.J.,
in *Chapman*
v. Walton.

The particular inquiry that must be made is well stated by Tindal, C.J., in *Chapman v. Walton*:¹ "The point, therefore, to be determined is not whether the defendant arrived at a correct conclusion" "but whether" "he did or did not exercise a reasonable and proper care, skill, and judgment. This is a question of fact, the decision of which appears to us to rest upon the further inquiry—viz., whether other persons exercising the same profession or calling, and being men of experience and skill therein, would or would not have come to the same conclusion as the defendant. For the defendant did not contract that he would bring to the performance of his duty, on this occasion, an extraordinary degree of skill, but only a reasonable and ordinary proportion of it; and it appears to us, that it is not only an unobjectionable mode, but the most satisfactory mode of determining this question to shew by evidence whether a majority of skilful and experienced brokers would have come to the same conclusion as the defendant. If nine brokers of experience out of ten would have done the same as the defendant under the same circumstances, or even if as many out of a given number would have been of his opinion as against it, he who only stipulates to bring a reasonable degree of skill to the performance of his duty, would be entitled to a verdict in his favour."

Where reasonable skill and diligence according to the accepted standard of skill has been applied, then no liability for loss by robbery, fire, or accident.

If reasonable skill and diligence, as tried by the test just indicated, have been used, the professional man or the killed workman, as the case may be, is not liable for accidents, or losses, or damage happening without his default; for example, losses by robbery, by fire, or by other accident, either at sea or on land.²

¹ 10 Bing. 57. In the "*William Lindsay*," L. R. 5 P. C. 338, at 343, it is said, with reference to the question of liability for mooring to a buoy approved by the port authorities without examining it, and which broke and caused the damage for which the plaintiff sued, "These questions of negligence must be decided by what a prudent and skilful seaman would do under the circumstances, and by what he is able to do. It is obvious that no man, however prudent and however desirous to be on the safe side, would be able to examine these buoys, so as to discover whether there were latent defects in them or not. He must, to a certain extent, trust to the sanction which has been given to them by the authorities of the port. No doubt that would not absolve him from all further precaution. He ought not implicitly to trust to that which he cannot to a certainty know is a safe buoy, and he ought to take reasonable precautions, in the event of its not holding him, to bring up and secure himself from danger." *Ante*, 1151.

² Story, *Agency* (9th ed.), § 188.

The case has been put of a skilled performer being employed for the unusual and special skill that he possesses. This often happens with engineers, architects, and persons peculiarly skilled in works of difficulty and delicacy. An extraordinary fee is given for a special degree of skill and experience. The recipient thereupon becomes bound to a greater degree of diligence than the ordinary expert. He becomes bound to a diligence measured by the consummate skill attributed to him which merits the unusual fee. Wharton,¹ quoting Mommsen, cites the case of Luca Giordano, a Neapolitan painter of extraordinary talents, which he never fully displayed by reason of an execution as rapid as his talents were remarkable.² Any one employing him could not therefore look for a picture equal to Giordano's talents elaborated by an average man's care. The opinion of Mommsen, in which Wharton concurs, is that the skill that could be legally exacted from such a man would be, not the skill he could exert, but the skill that he usually employed when working for others. This seems to give a satisfactory test for the decision of these cases.

Where unusual skill must be exerted.

Case cited by Mommsen.

A singer at the opera, engaged there on account of special and well-recognised powers, could not avoid liability for negligence by shewing that her performance was up to the average of singers. The test would be whether her performance was equal to that which persons of similar powers in similar positions could be reasonably expected to give; or, if the performer were phenomenal, whether the performance was such as was to be expected from experience based on the result of the average performance of the artiste.

Opera singer.

J. ARCHITECTS, SURVEYORS, &c.

An architect is defined³ as "a skilled professor of the art of building, whose business it is to prepare the plans of edifices, and exercise a general superintendence over the course of their erection."

Definition.

¹ Negligence (2nd ed.), § 51.

² "He was the son of Antonio Giordano, an obscure artist, whom he had surpassed when he was eight years old." "Such was the demand for his drawings and sketches, that his father continually urged him to despatch by repeating to him, 'Luca, fa presto' ('Luke, make haste'), and hence he came to be designated by this phrase" (Bryan, Dictionary of Painters, *sub nom.*). "Giordano was the last of the great Italian painters. Some of his works show marks of genius, and with more conscientious labour he might have equalled the greatest masters, but owing to his fatal facility of execution he violated all the rules of good taste" (Champlin, Cyclopedic of Painters, *sub nom.*).

³ Murray, English Dictionary, *sub voc.* Mr. Ruskin's conception, if adopted, would probably dispense with the consideration of the subject altogether through want of material to deal with; he says: "No person who is not a great sculptor or painter can be an architect. If he is not a sculptor or painter, he can only be a builder": Rusk. Lect. on Archit. Add. to Lect. ii. p. 108 of ed. of 1891.

Services
expected of
him.

When an architect is employed on the erection of a house he is expected usually to perform the following services :—

1. To prepare all drawings and a specification of the work.
2. To arrange terms with the contractor.
3. To superintend the work.
4. To certify what amount of money that is to be paid at the dates stipulated in the contract.¹

Surveyor to
take out the
quantities.

In extensive operations the usage is for architects to employ a quantity surveyor, and for the successful competitor to add to his contract such quantity surveyor's charges.² Where the architect does supply quantities he may thereby become personally liable for any loss occurring to a contractor through error on his part. In Mr. Glen's pamphlet, just cited, the following case³ is given :— Plaintiff sued the defendant, an architect, to recover damages for supplying to the plaintiff an inaccurate statement of the quantities of work and materials required for the erection of a building which the plaintiff contracted to erect. The defendant advertised for tenders for the erection of a Baptist chapel, stating that the plans and specifications could be seen, and that the quantities of work and material would be furnished. The plaintiff obtained from the defendant's office a table of such quantities, headed by a statement that it was to be paid for by the successful competitor. From this table the plaintiff calculated his tender, which was accepted.

Bolt v.
Thomas,
MS. case.

Plaintiff's
contention.

Defendant's
contention

Direction of
Byles, J., to
the jury.

For the plaintiff it was contended that, independently of the computations, there was an implied undertaking in law that the bill of quantities paid for by the plaintiff should be reasonably correct. For the defendant it was contended that there was no contract between the architect and builder, that the committee had stipulated with the plaintiff that he should pay the architect, and that the architect was not liable to the builder for any inaccuracy in the quantities. Byles, J., in summing up, directed the jury that the defendant had stipulated that the plaintiff should pay him for the calculation of the quantities, and, having been paid for them by him, the defendant was liable to compensate him if the bill was not reasonably correct. The jury thereupon found for the plaintiff.

¹ The Duties, Obligations, and Mutual Relations of Architect, Client, and Contractor with reference to English and Foreign Practice, by Arthur Cates—a paper read before the Royal Institute of British Architects, 6th May 1884. For the law on this subject see a pamphlet, *The Law in relation to the Legal Liability of Engineers, Architects, Contractors, and Builders*, by W. C. Glen.

² *Kemp v. Rose*, 1 Giff. 258, where it was held that it is neither the usual nor a safe course for the architect to prepare bills of particulars or quantities of the works to be executed; *Moon v. Guardians of the Witney Union*, 3 Bing. N. C. 814.

³ *Bolt v. Thomas*, cited from a MS. report: reported also in *Hudson on Building Contracts*, p. 684.

The direction of Byles, J., practically comes to telling the jury Considered. that, if they found in this particular case that a contract existed, the verdict should be for the plaintiff, and they so found. The case must not be stretched further than to favour the right where there is a contract, and the more difficult question, whether there is a contract, is not affected by it.

In *Money Penny v. Hartland*, an early case at *Nisi Prius*,¹ Money Penny
v. Hartland.
Abbott, C.J.,^s
dictum. Abbott, C.J., laid down that, if a surveyor, who makes an estimate, sues those who employ him for the value of his services, and if it appear that he was so negligent that he did not inform himself, but went upon the information of others, which proved to be false or insufficient, he is not entitled to recover for his plans and specifications; "for every person, employed as a surveyor, must use due diligence. Whether the plaintiff has used due diligence or not, is a question for the jury; and if the plaintiff went on the statements of others, that is no excuse, as it was his duty to ascertain how the fact was, or to report to his employers that he only went on the information of others, or that the fact was uncertain." This ruling was sustained *in banc* on the ground that, if the plaintiff "led his employers into a great expense by his want of care, his services would be worth nothing."² In a subsequent phase of the same case, Best, C.J.,³ explains this by Explained by
Best, C.J. saying: "Supposing negligence or want of skill to be sufficiently made out, unless that negligence or want of skill has been to an extent that has rendered the work useless to the defendants, they must pay him, and seek their remedy in a cross-action. For if it were not so, a man by a small error might deprive himself of his whole remuneration." The learned Judge continues: "I grant that it is not a trifling deviation from an estimate that is to prevent a party's recovering. But if a surveyor delivers in an estimate greatly below the sum at which a work can be done, and thereby induces a private person to undertake what he would not otherwise do, then I think he is not entitled to recover."⁴

In this case the action was by the negligent person against Considered. those who had indubitably employed him, and the decision is merely that he is not to recover for worthless work. It follows that, if the employer brings an action for negligence in the performance of the work of the architect, and were to shew that through his negligence he had been put to additional expense, he can recover.

¹ 1 C. & P. 352, at 354.

² *L. c.* per Bayley, J., at 355.

³ 2 C. & P. 378, at 380.

⁴ *Cp. Nelson v. Spooner*, 2 F. & F. 613.

Relation of
the builder to
the architect
and quantity
surveyor.

A more difficult question arises in considering the relations of the builder to the architect and quantity surveyor.

Observation
of Erle, C.J.

In *Scrivener v. Pask*¹ it was sought by builders to charge the employer for want of accuracy in bills of quantities furnished by his architect (who took them out himself) to the builders, through depending on which the builders were put to unexpected cost. The Exchequer Chamber decided, affirming the Common Pleas, that the architect was not employed to tell the builders that the quantities of materials required to complete the work would be so much and no more, and therefore the defendant was not liable. In the course of the argument in the Common Pleas, Erle, C.J., said:² "I should have thought it was the builder's duty to see to the accuracy of the quantities before he tenders. If he chose to trust to the accuracy of the information given to him by the architect, well and good;" and in his judgment,³ "there was evidence from the mouth of one of the plaintiffs' own witnesses that a careful builder always calculates the quantities for himself before he makes a tender." Blackburn, J., during the argument in the Exchequer Chamber, is reported as saying: "If there had been misconduct on the part of Paice [the surveyor], the plaintiffs have their remedy against him."⁴ This seems inconsistent with Erle, C.J.'s, view, that there should be independent inquiry on the part of the builder. If there is no duty to test, the surveyor would be liable; if there is a duty, he would not. The whole matter turns on the determination of this. Blackburn, J., however, limits his expression to "misconduct," and is speaking of fraud or misrepresentation, and it is in this limitation that his statement is to be taken. "To entitle the plaintiffs to recover," he says,⁵ "they must make out three things—that Paice was the defendant's agent, that Paice was guilty of fraud or misrepresentation, and that the defendant knew of and sanctioned it."

Observation of
Blackburn, J.

*Thorn v. Mayor
&c. of London.*

The responsibility of an employer for plans and specifications upon the basis of which the successful contractor had tendered was considered in the House of Lords in *Thorn v. Mayor, &c., of London*.⁶ The plaintiff, a contractor, sought to make the defendants, his employers, liable as on an implied warranty that the work, the subject of his contract, could be inexpensively done with the means and appliances stated in the plans and specification prepared for the use of those who were asked to tender for its execution. The Court of Exchequer,⁷ the Exchequer Chamber,⁸

¹ 18 C. B. N. S. 785, Ex. Ch. L. R. 1 C. P. 715

² 18 C. B. N. S. at 794.

³ See as to this *Pasley v. Freeman*, 2 Sm. L. C. (9th ed.) 74.

⁴ *Ibid.*

⁵ L. R. 9 Ex. 163.

⁶ L. c. at 796.

⁷ 1 App. Cas. 120.

⁸ L. R. 10 Ex. 112.

and the House of Lords were unanimous that no such liability existed. Lord Cairns¹ regarded the contention as raising "a very serious and a very alarming question." To affirm the proposition "would go to nearly every kind of work in which a contractor is employed, and in which, for convenience, specifications of the details of the work are issued by the person who desires to employ the contractor. In those specifications, and in the contracts founded upon them, an elasticity or latitude is always given by provisions for extra additional and expected work; but if it were to be held that there is, with regard to the specification itself, an implied warranty on the part of the person who invites tenders for the contract, that the work can be done in the way and under the conditions mentioned in the specification, so that he is to be liable in damages if it is found that it cannot be so done, the consequences, I say, my Lords, would be most alarming. They would be consequences which would go to every person who, having employed an architect to prepare a plan for a house, afterwards enters into a contract to have the house built according to that plan. They would go to every case in which any work was invited to be done according to a specification, however unexpected might be the results from that work when it came actually to be executed." Lord Chelmsford states the duty of a contractor in such circumstances to be to inform himself "of all the particulars connected with the work, and especially as to the practicability of executing every part of the work contained in the specification according to the specified terms and conditions." He adds: "It is also said that it is the usage of contractors to rely on the specification, and not to examine it particularly for themselves. If so, it is an usage of blind confidence of a most unreasonable description." The law, then, seems to be that—

Lord Cairns's
opinion.

Lord Chelms-
ford's state-
ment of duty.

1. As between builder and owner there is no warranty of the accuracy of bills of quantities.²

2. As between owner and architect there is a warranty, not of absolute but of reasonable accuracy; possibly also between the owner and the quantity surveyor; if the incorrectness of the estimates arises from the inherent difficulty of the work there is no liability;³ if the architect is negligent, he remains liable to the owner, despite his having given a certificate which as between the owner and the builder is final.⁴

3. As between quantity surveyor and builder there is no liability for negligence in preparing quantities; since the quantities pass through the architect's hands before they are used by the

¹ 1 App. Cas. at 128.

² *Money Penny v. Hartland*, 1 C. & P. 352, 2 C. & P. 378.

³ *Addison, Contracts* (9th ed.), 816.

⁴ *Rogers v. James*, 8 Times L. R. 67 (C.A.).

builder or surveyor;¹ or if they do not, the builder is disentitled to charge any one for the consequences of his neglect of an obvious precaution.

4. As between builder and architect, there is a duty on the builder's part to inquire as to the correctness of quantities.² If the builder has neglected to inquire and has entered upon the performance of the work on the faith of the accuracy of the quantities, which subsequently he discovers not to be justified, he should not continue the works under the contract in the expectation of something in addition to the contract price being allowed him, but he should require the requisite adjustment to be made there and then, or else repudiate the contract altogether.³ Where there is fraud or misrepresentation the surveyor is liable.⁴

5. As between quantity surveyor and owner there is an usage entitling the architect to employ a surveyor, and in the event of no tender being accepted and no contract entered into with a builder, the owner is liable to the surveyor for the price of the work done under the implied authority of the owner to the architect;⁵ but if the owner has accepted a tender with a builder in good faith for the execution of the work, the owner has discharged his duty to the quantity surveyor, and is not liable for the "surveyor's charges."⁶

6. As between quantity surveyor and builder there is a contract implied, that, on the builder obtaining the contract through using the surveyor's calculations, he will pay the surveyor his fees.⁷

¹ *Priestley v. Stone*, 4 Times L. R. (C. A.) 730: more fully reported in Hudson, Building Contracts, 737. But a quantity surveyor may maintain an action against the builder on proof of an usage of the building trade that the builder whose tender was accepted was liable to the quantity surveyor for the amount due on the quantities. *North v. Bassett* (1892), 1 Q. B. 333.

² *Scrivener v. Pask*, 18 C. B. N. S. 785, at 797, L. R. 1 C. P. 715; *Thorn v. Mayor, &c.*, of London, 1 App. Cas. 120.

³ *Kimberley v. Dick*, L. R. 13 Eq. 1 at 20.

⁴ *Langridge v. Levy*, 2 M. & W. 529, 4 M. & W. 337; *Swift v. Winterbotham*, L. R. 8 Q. B. 244, overruled on one point, *sub nom.* *Swift v. Jewsbury*, L. R. 9 Q. B. 301. See, too, per Lord Esher, M.R., *Priestley v. Stone*, 4 Times L. R. 730. See *Robertson v. Fleming*, 4 Macq. (H. L. Sc.) 167, where the House of Lords, composed of Lords Campbell, Cranworth, Wensleydale, and Chelmsford, were agreed that the doctrine that where A employs B, a professional man, to do some act professionally, under which, when done, C would derive a benefit, and B is guilty of negligence, so that C loses the contemplated benefit, B is, as a matter of course, responsible to C, "is evidently untenable"; *Pimm v. Roper*, 2 F. & F. 783. *Cann v. Wilson*, 39 Ch. D. 39, is overruled by *Le Lievre v. Gould* (1893), 1 Q. B. 491.

⁵ *Moon v. Guardians of the Witney Union*, 3 Bing. N. C. 814; *Taylor v. Hall*, Ir. R. 4 C. L. 467. The builder may make a contract with the surveyor, on which he is liable notwithstanding abandonment of the building, *McConnell v. Kilgallen*, 2 L. R. Ir. H. L. 119.

⁶ *Young v. Smith*, reported in Hudson, Building Contracts, 784, cited *North v. Bassett* (1892), 1 Q. B. 333.

⁷ *Taylor v. Hall*, Ir. R. 4 C. L. 467, at 479. See also *North v. Bassett* (1892), 1 Q. B. 333.

7. As between quantity surveyor and architect there is no liability, since the architect employs the surveyor as the agent for the owner, and not on his own account.

On the retainer of an architect he becomes the agent of the employer, and the ordinary rules of law governing that relationship become applicable.¹

In a Canadian case,² an architect, on being sued by his employer for negligence, set up that by the contract he was constituted arbitrator as between his employer and the builder, and therefore came within the protection of the principle enunciated in *Stevenson v. Watson*.³ It was held that, notwithstanding this, he is answerable to his employer for either negligence or unskilfulness in the performance of his duty as architect.

Architect, although in a sense arbitrator, liable for negligence to his employer.

The surveyor of a builder owes no duty to the mortgagees of his employer in the absence of any contract between himself and them to exercise care in the giving certificates of the progress of the work, and no action for negligence can be maintained for loss caused to the mortgagees through having advanced money on the faith of untrue statements contained in the certificates unless there is fraud proved.⁴

Surveyor of builder owes no duty to the mortgagees of his employer.

AUCTIONEERS.

An auctioneer is "one who conducts sales by auction;"⁵ Definition.

¹ *Kimberley v. Dick*, L. R. 13 Eq. 1. As to the negligence of a surveyor in giving advice as to advancing money on mortgage of certain property, *Crabb v. Brinsley*, *Law Journal* newspaper, Nov. 3, 1888, 573. By the law of Lower Canada both architect and builder are liable for ten years after completion for *vices du sol*, and for defects in plan or construction: *Wardle v. Bethune*, L. R. 4 P. C. 33. See Code, Civil, Art. 1788-1793.

² *Badgley v. Dickson*, 13 Ont. App. 494, where *Irving v. Morrison*, 27 Upp. Can. C. P. 242, is approved. In *Stafford v. Bell*, 6 Upp. Can. App. 273, a provincial surveyor sworn, "to survey agreeably to the directions of the statute," is still liable for negligence to his employers.

³ 4 C. P. D. 148.

⁴ *Le Lievre v. Gould* (1893), 1 Q.B. 491.

⁵ *Murray*, *English Dictionary*, *sub voc.* Auction is defined by the same authority, "A public sale in which each bidder offers an increase upon the price offered by the preceding, the article put up being sold to the highest bidder." An auctioneer is a person who is authorized to sell goods or merchandise at public auction or sale for a recompense or (as it is commonly called) a commission: *Story, Agency* (9th ed.), § 27; see also §§ 107, 108. As to auction sales of goods, see 56 & 57 Vict. c. 71, s. 58. See *Dart, Vendors and Purchasers* (6th ed.), 203-226. *Fowle v. Common Council of Alexandria*, 3 Peters (U. S.) 398, is a curious case, more properly perhaps to be considered in connection with the powers and liabilities of corporations, *ante*, 334 *et seqq.* Plaintiff sought to recover from the Corporation of Alexandria the amount of the sales of the plaintiff's goods, lost by the insolvency and fraudulent conduct of an auctioneer, on an alleged liability, in consequence of the Corporation having omitted to take a bond from the auctioneer, who had a licence from the Corporation to carry on the trade of an auctioneer, which, however, the law did not empower that body to grant. *Marshall, C.J.*, delivered the opinion of the Court as follows: "Is the town responsible for the losses sustained by individuals from the fraudulent conduct of the auctioneer? He is not; the officer or agent of the Corporation, but is understood to act for himself as entirely as a tavern-keeper or any other person who may carry on any business under a licence from the corporate body. Is a municipal corporation, established for the general purposes of government, with limited legislative powers, liable for losses consequent on its having

and an auction is¹ "a sale, however conducted, by which a person obliges himself to transfer property to the highest bidder within the conditions of the sale; it ordinarily denotes such a sale conducted in the usual manner."

Duty cannot
be delegated.
What the
duty is.

The trust given to an auctioneer being special and involving discretion, cannot be delegated to a clerk or subaltern.² It is the duty of an auctioneer, says an early case, to take the same care of property entrusted to him for sale as he would of his own. This means as an average auctioneer would of his own. In the absence of a special contract, by which goods are entrusted to a man because of the possession of personal qualities, the auctioneer's undertaking is not to act by reference to his individual prudence, which may be greater or less than the average, but only to act up to the standard of care and diligence which other persons exercising the same calling, and being men of experience, are ordinarily expected to attain.

Rule of duty
for an
auctioneer
stated by Lord
Ellenborough,
C.J.

The rule is accurately stated by Lord Ellenborough, C.J.:³ "I pay an auctioneer, as I do any other professional man, for the exercise of skill on my behalf, which I do not myself possess, and I have a right to the exercise of such skill as is ordinarily possessed by men of that profession or business. If from his negligence or carelessness he leads me into mischief, he cannot ask for a recompense, although from a misplaced confidence I followed his advice without remonstrance or suspicion."

Auctioneer not
to purchase
for himself.

An auctioneer may not purchase for himself,⁴ and may sell only for ready money, unless otherwise authorized; ⁵ if he sells

misconstrued the extent of its powers, in granting a licence which it had not authority to grant, without taking that security for the conduct of the person obtaining the licence which its own ordinances had been supposed to require, and which might protect those who transacted business with the person acting under the licence? We find no case in which this principle has been affirmed. That corporations are bound by their contracts is admitted; that money corporations, or those carrying on business for themselves, are liable for torts, is well settled; but that a legislative corporation, established as a part of the government of the country, is liable for losses sustained by a non-feasance, by an omission of the corporate body to observe a law of its own, in which no penalty is provided, is a principle for which we can find no precedent. We are not prepared to make one in this case."

¹ Bateman, Law of Auctions. Cp. Dart, Vendors and Purchasers (6th ed.), 203.

² Coles v. Trecothick, 9 Ves. 234, at 251. Cp. Catlin v. Bell, 4 Camp. 183; Cobb v. Becke, 6 Q. B. 930, per Lord Denman, C.J., at 936. Notwithstanding this principle, authority to employ a deputy may be implied by the recognised usage of a trade; for instance, an architect may employ a quantity surveyor to make out the quantities of the building proposed to be erected. This limitation on the application of the maxim *delegata potestas non potest delegari* (2 Co. Inst. 597) is fully explained by Theiger, L.J., delivering the judgment of the Court in *De Bussche v. Alt*, 8 Ch. Div. 286, at 310. Cp. *White v. Proctor*. 4 Taunt. 209; *Cockran v. Irlam*, 2 M. & S. 301, n.

³ *Denew v. Deverell*, 3 Camp. 451.

⁴ *Oliver v. Court*, 8 Price (Ex.) 127 at 150. Cp. *Hughes's Case*, 6 Ves. 617. In this case the purchase was set aside after more than twelve years.

⁵ *Williams v. Evans*, L. R. 1 Q. B. 352; *Williams v. Millington*, 1 H. Bl. 81. "The auctioneer is nothing more than an agent for the vendor:" per Lord Eldon, *Sanderson v. Walker*, 13 Ves. 601. Cp. per Bayley, J., *Kenworthy v. Schofield*, 2 B. & C. 945, at 947. "That an auctioneer is the general agent for the owner usually"

with notice that what he is about to sell does not belong to his principal, he is personally liable for the real value of the goods.¹

If the auctioneer does nothing more than settle the price as between a vendor and a purchaser of the goods, and takes his commission, he is not liable for a conversion in the event of it turning out that the vendor has no right to sell; for the auctioneer there acts as a mere conduit pipe.² Where, however, the auctioneer receives the goods into his custody, and affects to deal with them so as to pass the property in them, he becomes liable for a conversion, if they are not the property of the vendor.³ Again, if the auctioneer does not disclose the name of his principal at the time of the sale, the purchaser is entitled to look to him personally for the completion of the contract and for damages for its non-performance.⁴

Where the auctioneer is liable for a conversion.

"An auctioneer," says Lord Loughborough in *Williams v. Millington*,⁵ "has a possession coupled with an interest in goods which he is employed to sell, not a bare custody like a servant

Position of an auctioneer.

"cannot be doubtful. He is so till the sale is completed. And though he may be agent of the buyer after the sale for some purposes, such as to take the case out of the Statute of Frauds, yet this does not affect the other principle, that till the sale, and before it, he acts for the vendor alone": *Veazie v. Williams*, 8 How. (U. S.) 134, at 152 (the authorities cited are omitted).

¹ 3 Chitty, Commerce and Manufactures, 218; *Hardacre v. Stewart*, 5 Esp. (N.P.) 103; *Davis v. Artingstall*, 49 L. J. Ch. 609. How an auctioneer may make himself personally liable, see *Warlow v. Harrison*, 1 E. & E. 295, affirmed 29 L. J. Q. B. 14. There is no contract that things shall be actually put up by auction by merely advertising the sale: *Harris v. Nickerson*, L. R. 8 Q. B. 286. See 56 & 57 Vict. c. 71, s. 58, as to the right to bid. As to the employment of a puffer in auctions of real estate, the strictness of the law as laid down by Lord Mansfield in *Buxwell v. Christie*, 1 Cowp. 395, and Lord Kenyon, C.J., in *Howard v. Castle*, 6 T. R. 642, was relaxed in *Smith v. Clarke*, 12 Ves. 477; but the remarks of Lord Cranworth, C., in *Mortimer v. Bell*, L. R. 1 Ch. 10, occasioned the passing of 30 & 31 Vict. c. 48. The cases apart from the statute are fully collected in *Veazie v. Williams*, 8 How. (U. S.) 134 at 153. See Dart, Vendors and Purchasers (6th ed.), 224.

² *Cochrane v. Rymill*, 27 W. R. 776, considered with *National Mercantile Bank v. Rymill*, 44 L. T. 767. This is possibly the explanation of *Turner v. Hockey*, 56 L. J. Q. B. 301, but *quere*, is that case rightly decided? See per Romer, J., *Barker v. Furlong* (1891), 2 Ch. at 183, and the remarks of Collins, J., in *Consolidated Company v. Curtis* (1892), 1 Q. B. 495, at 502. See also per Holmes, J., *Robinson v. Bird*, 158 Mass. 357, 35 Am. St. R. 495.

³ *Hollins v. Fowler*, L. R. 7 H. L. 757; *Barker v. Furlong* (1891), 2 Ch. 172; *Consolidated Company v. Curtis* (1892), 1 Q. B. 495. In *Nulty v. Fagan*, 22 L. R. Ir. 604, an auctioneer who sold assets of a deceased person was held to be liable for the debts of the deceased as executor *de son tort*, failing proof that he acted under an executor who had proved the will. In *Ganly v. Ledwidge*, Ir. R. 10 C. L. 33, the Irish Court of Queen's Bench held that a "salesmaster"—salesmasters are "known agents for the sale of cattle, through whose agency the public usually deal," and "who are paid by the vendors by a percentage fee on the sales" (see at 39)—who publicly sells and delivers a stolen beast, is responsible to the true owner for the value of the beast, though he acts innocently and in the ordinary course of business. This is followed by the Irish Court of Appeal in *Delaney v. Wallis*, 14 L. R. Ir. 31. *Ante*, 905, n. 4, 918, n. 2, and 1099, n. 2. The law in America appears to be the same; see *Swinn v. Wilson*, 25 Am. St. R. 110, at 113.

⁴ *Hanson v. Koberdeau, Peake* (N.P.) 120; *Wood v. Baxter*, 49 L. T. 45, where the cases are collected and commented on.

⁵ 1 H. Bl. 81, at 84, 85. *Wood v. Baxter*, 49 L. T. 45.

or shopman. There is no difference whether the sale be on the premises of the owner or in a public auction-room; for on the premises of the owner an actual possession is given to the auctioneer and his servants by the owner, not merely an authority to sell. I have said a possession coupled with an interest; but an auctioneer has also a special property in him with a lien for the charges of the sale, the commission, and the auction duty, which he is bound to pay." From this it has been held to follow that in some circumstances the auctioneer is responsible for his neglect to deliver.¹

Neglect to deliver.

In ordinary cases, where a deposit is to be paid, the auctioneer should ask the purchaser to pay the deposit; should he neglect to do so, and the purchaser go away without paying, the plaintiff is entitled to nominal damages,² if in the opinion of the jury there is a breach of duty, even though the seller suffer no real damage therefrom.

Neglect to obtain deposit.

The auctioneer should keep the deposit till the contract is completed, since he holds it not as agent but as stakeholder.³ On completion he must immediately account for it and pay the balance due to the vendor; ⁴ though he is not in general liable to pay interest; ⁵ nor is he responsible for the purchase-money unless it is paid to him or his agent; ⁶ nor does he bind himself that the purchase shall be completed.⁷

Retention of deposit till completion of contract.

In *Nelson v. Aldridge*,⁸ an auctioneer, having sold some horses sent to him in the course of his business, afterwards let the purchaser of one of them rescind the contract on the ground that the horse was not truly described at the sale. He was held liable to his employer for the price at which the horse had been sold, since he had deviated from the course of his duty in taking upon himself to rescind the contract, and he could only be justified by shewing particular instructions authorising his doing so; this he was not in a position to shew. Where there were special conditions of sale proved the auctioneer was held not liable, though the purchase money had been paid to him and returned to the purchaser.⁹

Where auctioneer permitted rescission without particular instruction.

Where there were special conditions of sale proved.

¹ *Woolfe v. Horne*, 2 Q. B. D. 355.

² *Hibbert v. Bayley*, 2 F. & F. 48.

³ *Edwards v. Hodding*, 5 Taunt. 815; *Edgell v. Day*, L. R. 1 C. P. 80; *Gray v. Gutteridge*, 3 C. & P. 40. See *Spittle v. Lavender*, 2 B. & B. 452.

⁴ *Crosskey v. Mills*, 1 Cr. M. & R. 298; *Gray v. Haig*, 20 Beav. 219.

⁵ *Turner v. Burkinshaw*, L. R. 2 Ch. 488.

⁶ *Andrew v. Robinson*, 3 Camp. 199.

⁷ *Kavanagh v. Cuthbert*, Ir. R. 9 C. L. 136.

⁸ 2 Stark. (N. P.) 435.

⁹ *Hardingham v. Allen*, 5 C. B. 793; *Murray v. Mann*, 2 Ex. 538. An auctioneer's implied authority to sign for the purchaser upon the sale of land by auction must be exercised at the time of the sale: *Buckmaster v. Harrop*, 7 Ves. 341. In *Webster v. Hoban*, 7 Cranch (U. S.) 399, there was a condition that the purchaser at a sale by auction should within thirty days secure the purchase money with interest by his

If the auctioneer negligently misdescribe the property he has to sell, he will be liable to repay to the vendor the amount claimable by the purchaser in respect of such misdescription.¹ Negligent misdescription.

In New Zealand an auctioneer has been held liable where through negligence he failed to accept a bid, and in consequence the sale became abortive. The measure of damages was said to be the same as if the bid had been accepted and the bidder had afterwards repudiated the purchase.² Auctioneer failing to accept a bid.

An auctioneer selling goods on the premises of another is not responsible for the sufficiency of the premises or of appliances connected with them, so as to be liable in damages for injuries caused to his own servant by their insufficiency.³ "An auctioneer," says Lord Kenyon, C.J.,⁴ is "bound only to take due care, such as he would do of his own goods; so that for a loss arising from misfortune or unavoidable accident he is not liable."⁵ Auctioneer selling on premises of another.

Where an auctioneer and house agent, who was instructed not to part with a licence to assign premises till the tenant had paid the last quarter's rent, which was in arrear, took a cheque drawn to his order which was subsequently dishonoured, he was held liable for negligence, and the measure of damages for which he was liable was the full amount of the arrears of rent.⁶ House agent not conforming to instructions.

A house agent letting a house for his employer is liable if he neglects to make reasonable inquiries as to the solvency of the tenant.⁷ House agent letting house without making reasonable inquiries as to tenant.

STOCKBROKERS.

A stockbroker is a broker who deals in the purchase and sale of stocks and shares.⁷ His business in London is carried on in connection with the Stock Exchange,⁸ and under rules and regula-

Definition.
promissory notes with two approved indorsers, and that "in case of compliance he was to receive a good and complete title to the property, and on failing to comply within the thirty days the property was then to be resold on account of the first purchaser." On non-compliance with the condition by the purchaser, an action was brought by the vendor, who contended that the remedy by resale was merely cumulative. The opinion of the Court was, however, adverse to him.

¹ *Parker v. Farebrother*, 1 C. L. R. 323.

² *Logie v. Gillies*, N. Z. L. R. 4 S. C. 65.

³ *Nelson v. Scott*, 19 Rettie 425.

⁴ *Maltby v. Christie*, 1 Esp. (N. P.) 340, at 341.

⁵ *Papè v. Westacott* (1894), 1 Q. B. 272.

⁶ *Hayes v. Tindall*, 2 F. & F. 444.

⁷ *Ogilvie's Dictionary, sub voc.* See *Warren v. Shook*, 91 U. S. (1 Otto) 704. A Report of a Royal Commission on the origin, object, present condition, customs, and usages of the London Stock Exchange was presented to Parliament in 1878. A summary of it is to be found in *McCulloch, Dictionary of Commerce, Supplement III.*

⁸ Before 1773 stockbrokers conducted their business in and about the Royal Exchange. In that year they formed themselves into an association called the Stock Exchange, first having its headquarters in Sweeting Alley, Threadneedle Street, and then removing to Capel Court in 1801, where a building was erected, with a capital of £20,000, raised by means of four hundred shares of £50 each.

tions¹ imposed by the committee of that institution, binding universally on all members, and embodying certain usages which non-members doing business with stockbrokers are *prima facie* considered to have knowledge of, and to be bound by. In some provincial towns there are also Stock Exchanges.

Where a dispute arises between members of the Stock Exchange.

In the case of a dispute arising between members of the Stock Exchange in their capacity of stockbrokers, the decision must be given with reference to the rules to the observance of which they have bound themselves by becoming members.² In questions with persons not members the general law of the land is paramount to any special regulations.³ This principle is subject to the consideration that if there is at a particular place an established usage in the manner of dealing and making contracts, a person who is employed to deal or make a contract has an implied authority to act in the usual course of business, even though the employer may not actually know what that course of business is ;⁴ it is also subject to the further qualification that such course of business must neither be illegal nor unreasonable,⁵ and must consist of usages of which the principal has knowledge either actually or constructively.

Blackburn, J.'s, judgment in *Mollett v. Robinson* in the Exchequer Chamber,

"I think," said Blackburn, J., in the Exchequer Chamber in *Mollett v. Robinson*,⁶ "it is now thoroughly established that a person who deals in a general market is bound to inquire what its usages are ; and that those who deal with him have a right to hold him bound by them to the same extent as they would have been entitled to hold a person bound who belongs to the place. He is precluded from setting up as against the persons he dealt with, his ignorance of that which he ought to have known." But with this must be taken the statement of Lord Chelmsford in the same case, giving the leading opinion in the House of Lords,⁷ "No doubt a person employing a broker may engage his services upon

to be taken in connection with Lord Chelmsford's opinion in the House of Lords.

¹ These rules and regulations form an appendix to Melsheimer and Gardner, *Law and Customs of the Stock Exchange*. See also McCulloch, *Dictionary of Commerce*, Supplement III.

² *Duncan v. Hill*, L. R. 8 Ex. 242, distinguished in *Hartas v. Ribbons*, 22 Q. B. D. 254 ; *Lacey v. Hill*, *Scrimgeour's Claim*, L. R. 8 Ch. 921. See *Lacey v. Hill*, *Crowley's Claim*, L. R. 18 Eq. 182, as to relations between broker and customer in the event of insolvency of the former.

³ *Tomkins v. Saffery*, 3 App. Cas. 213, distinguished in *Ex parte Grant*, *In re Plumbly*, 13 Ch. D. 667.

⁴ *Bayliffe v. Butterworth*, 1 Ex. 425 ; *Bayley v. Wilkins*, 7 C. B. 886 ; *Sutton v. Tatham*, 10 A. & E. 27 ; *Grissell v. Bristowe*, L. R. 4 C. P. 36 ; *Coles v. Bristowe*, L. R. 4 Ch. 3 ; *Maxted v. Paine*, L. R. 6 Ex. 132. See, too, *Nickalls v. Merry*, L. R. 7 H. L. 530. The Stock Exchange differs from Lloyd's in being within the description of a general market, while Lloyd's is a mere private place of business : *Sweeting v. Pearce*, 7 C. B. N. S. 449, 9 C. B. N. S. 534.

⁵ *Neilson v. James*, 9 Q. B. D. 546 ; *Mitchell v. City of Glasgow Bank*, 4 App. Cas. 624 ; *Perry v. Barnett*, 15 Q. B. D. 388.

⁶ L. R. 7 C. P. 84, at 111.

⁷ L. R. 7 H. L. 802, at 836.

any terms he pleases; and if a person employs a broker to transact for him upon a market with the usages of which the principal is unacquainted, he gives authority to the broker to make contracts upon the footing of such usages, provided they are such as regulate the mode of performing the contracts, and do not change their intrinsic character." . . . "A different relation can be established only by incorporating the usage into the employment,"¹ and then, speaking with reference to the facts before him relating to a usage of the London tallow trade allowing a broker to sell his own goods to the principal, which was claimed to be incorporated in a contract between broker and principal, though the principal was ignorant of its existence. Assuming that the usage was applicable, the learned Lord thus concludes: "² I hesitate to say that it would not apply in the case of persons knowing of its existence, and employing a broker to act for them in the market where it prevails. But the usage is of such a peculiar character, and is so completely at variance with the relations between the parties, converting a broker employed to buy into a principal selling for himself, and thereby giving him an interest wholly opposed to his duty,"³ that I think that no person who is ignorant of such an usage can be held to have agreed to submit to its conditions, merely by employing the services of a broker to whom the usage is known, to perform ordinary and accustomed duties belonging to such employment."

When a stockbroker⁴ is employed to make a bargain in the course of his business, his duty is not an absolute one to procure the stock in any event, and is no more than to use due and reasonable diligence in endeavouring to procure it; ⁵ so that where an order was given to a stockbroker for fifty *shares* in a foreign railway company at a time when there were no *shares* of the company in the market, but *letters of allotment* were shewn to be commonly bought and sold in the market as shares, and the stockbroker bought these, the Court of Exchequer refused a new trial where the verdict of the jury found that this was a compliance with the order.⁶ And where the plaintiff sought to recover against a stockbroker who had bought for him scrip certificates which were sold in the market as "Kentish Coast Railway Scrip," and were signed by the secretary of the railway company, the genuineness of which was afterwards denied by the directors, who alleged that they were issued by the secretary without authority, the proper question for the jury was held to be, not whether they were

Duty of stockbroker where he is employed to make a bargain in the course of his business.

Scrip certificates not genuine purchased for client.

¹ *L. c.* at 837.

² *L. c.* at 838.

³ *Maffet v. Stewart*, 14 *Rettie* 506.

⁴ *Westropp v. Solomon*, 8 *C. B.* 345; *Young v. Cole*, 3 *Bing. N. C.* 724.

⁵ *Fletcher v. Marshall*, 15 *M. & W.* 755.

⁶ *Mitchell v. Newhall*, 15 *M. & W.* 308.

genuine or not, but whether they were what the plaintiff intended defendant to buy for him ?¹

Where broker is employed to buy shares in a particular market, with particular usages as to payment.

On the other hand, a broker may be employed to buy shares in a particular market where there is a usage that, if the purchaser does not pay for his shares within a definite time, the vendor, after notice, may re-sell and charge the purchaser with the difference ; in that event, if the broker be compelled to pay a difference on the shares through neglect of his principal to supply the requisite funds, the difference may be recovered by action.²

Broker may render himself liable to the person with whom he has contracted on behalf of his principal.

The broker may render himself liable for negligence to the person with whom he has contracted on behalf of his principal as well as to his client. This was shewn in *In re National Coffee Palace Company, Ex parte Panmure*.³ A broker applied for shares in the company on behalf of one Lawrence, and which were allotted ; in fact, the broker had mistaken his authority to make the application for them. In the liquidation the company claimed damages against him, and the Court of Appeal held them entitled to recover, on the authority of *Collen v. Wright*⁴ that " a person professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract, upon the faith of the professed agent being duly authorized, that the authority which he professes to have does, in point of fact, exist." And, further, that, as the company loses an allottee, the measure of damages which the broker would have to pay would be the value to the company of the contract with the particular person ; which would of course differ as he was solvent or insolvent.⁵

Broker may be guilty of conversion.

A stockbroker who sells certificates of stock received by him for sale from one who stole them is guilty of a conversion, and liable to the true owner of the stock for its value,⁶ on the ground that it is the duty of the defendant " to know for whom he acted, and, unless he was willing to take the chances of loss, he ought to have satisfied himself that his principal was able to save him harmless if in the matter of his agency he incurred a personal liability by the conversion of property not belonging to such principal."

Client not liable for fault of broker.

Where a loss is caused by the fault of the broker, of course

¹ *Lamert v. Heath*, 15 M. & W. 486.

² *Pollock v. Stables*, 12 Q. B. 765. See *Davis v. Howard*, 24 Q. B. D. 691.

³ 24 Ch. D. 367, at 374.

⁴ 8 E. & B. 647, at 657.

⁵ *Meek v. Wendt*, 21 Q. B. D. 126.

⁶ *Swim v. Wilson*, 25 Am. St. R. 110 ; *Kimball v. Billings*, 55 Me. 147. See *ante*, 1377, and per Blackburn, J., in *Hollins v. Fowler*, L. R. 7 H. L. 757, at 766.

the client is not liable; the broker has to pay out of his own pocket.¹

It is the duty of the broker both to buy, and also to secure delivery of the security which he has bought for his principal, and to collect payments for securities sold within a reasonable time.² It is, however, not every delay that is negligent;³ indeed, in some circumstances of the market—as, for instance, where there is none of the special stock for sale—delay is unavoidable.

It is not the duty of a broker to get transfers registered;⁴ “all he has to do is to accept the transfer and pay the money.” If it afterwards turns out that the transfer could not be completed by registration, though an action may lie against the seller, apart from actual negligence in the broker's conduct of the business, there is no liability upon him. The broad proposition may be laid down that, wherever the buyer can insist upon receiving transfers and certificates in circumstances that have occurred, there the broker is free from liability to the buyer for the purchase (that is, in the absence of actual negligence).⁵

A question is suggested by Willes, J., in his judgment in *Chapman v. Shepherd*,⁶ and not answered by him, as to what the effect would be where the purchase is in itself illegal, though by the rules of the Stock Exchange binding amongst members. The answer to this question differs as it applies to the case where the object of the prohibition is the contract itself in its essence; and as it applies to the case where the prohibition is directed against the contract unless accompanied with certain circumstances or formalities.

In the former case a transaction avoided by the law as contrary to common principles of justice, or policy, or to the interests of the State cannot in any case be enforced.⁷ The other case, of a contract made in an illegal manner about something which may be done in a prescribed manner, is different. In *Seymour v. Bridge*,⁸ Mathew, J., was of opinion that, where a stockbroker

Duty of broker.

Not the duty of a broker to get transfers registered.

Question what would be the effect of an illegal bargain binding by the rules of the Stock Exchange.

Seymour v. Bridge.

¹ *Bowly v. Bell*, 3 C. B. 284; *Duncan v. Hill*, L. R. 6 Ex. 255, L. R. 8 Ex. 242.

² *Ante*, 1010.

³ *Fletcher v. Marshall*, 15 M. & W. 755.

⁴ *Taylor v. Stray*, 2 C. B. N. S. 175, at 195. It was held by the Court of Appeal in *London Founders Association, Limited v. Palmer*, 20 Q. B. Div. 576, that the contract for the sale of shares on the Stock Exchange does not import an undertaking by the vendor that the company shall register the transferee.

⁵ *Chapman v. Shepherd*, *Whitehead v. Izod*, L. R. 2 C. P. 228; *Biederman v. Stone*, L. R. 2 C. P. 504.

⁶ L. R. 2 C. P. at 239.

⁷ *Ante*, 874. The Court will take judicial notice of an illegal contract if the evidence discloses illegality. *Ex turpi causa non oritur actio*. *Scott v. Brown* (1892), 2 Q. B. 724; *Harris v. Rannels*, 12 How. (U. S.) 79, at 81, 2 Parsons, Contracts (6th ed.), 746. *Ante*, 874, n.

⁸ 14 Q. B. D. 460.

Perry v.
Barnett.

has been engaged to deal in bank shares which there was a usage to make contracts with regard to on the Stock Exchange in a method contravening the requirements of Leeman's Act¹ which prescribes a statement of the name of the registered proprietor of the shares in the bought and sold notes—his principal could not repudiate the purchase when made in accordance with the usages of the Stock Exchange, of which he had knowledge. In *Perry v. Barnett*,² an almost simultaneous case, Grove, J., held that, where knowledge of the usage could not be imputed to the principal, the contract could not be enforced. On appeal³ the decision was affirmed, on the ground⁴ that a man who employs a broker to deal on a particular market is not bound to know a usage there to make an invalid instead of a valid contract, and "a usage according to which when he has ordered one thing, he is expected to take another thing. It would not be reasonable, I think, to hold that a person is bound by such a usage unless beforehand he was told or had knowledge of it. Such a usage, when applied not to brokers but to strangers who are ignorant of it, is inconsistent with the contract of employment. To bind outsiders by it would be unreasonable; and it is as regards such outsiders, and such outsiders only, that such a usage can be called unreasonable, for it would not be unreasonable as regards those who know of it, and desire to be bound by it."⁵

Breach of the
provisions of
Leeman's Act,
30 & 31 Vict.
c. 29.

In *Neilson v. James*⁶ the action was by the holder of bank shares against a broker for breach of duty in not making a contract for the sale of his shares in a form that would bind jobbers to take the shares of his employer. The defence set up a custom on the Bristol Stock Exchange to ignore the provisions of Leeman's Act.⁷ The Court of Appeal held the plaintiff only bound by a custom both reasonable and legal, "for to that extent only can a person who is ignorant of a custom be assumed to acquiesce in and be bound by it."⁸ Therefore the duty of the defendant was to make a contract valid notwithstanding the custom of the Stock Exchange, failing in which he was liable.

Where a letter
of indemnity
is given.

The effect of these decisions seems to be that persons contracting with reference to a practice are bound by it; but a reference to it must be proved, else the law prevails and the contract does not admit of being enforced. In *Loring v. Davis*⁹ the matter was complicated by the defendant giving the brokers a letter of indemnity after a repudiation which the judge held "would have been an end" of their authority. The effect of this letter was

¹ 30 & 31 Vict. c. 29.

² 14 Q. B. D. 467.

³ 15 Q. B. Div. 388.

⁴ As stated by Bowen, L.J., at 396.

⁵ L. c. at 397.

⁶ 9 Q. B. Div. 546.

⁷ 30 & 31 Vict. c. 29.

⁸ L. c. per Brett, L.J., at 552.

⁹ 32 Ch. D. 625.

held to operate as a continuance of the agency, so that when the agent accepted the transfer on defendant's behalf, he thereby became equitable owner of the shares, and liable, notwithstanding the repudiation.

The United States Supreme Court case of *Galigher v. Jones*¹ merits Galigher v.
Jones. consideration. A stockbroker received orders by telegraph from his principal to sell certain securities of the principal in his hands and to invest the proceeds in certain other securities named at a fixed limit. At the time when the order was received the principal was considerably indebted to the agent for advances beyond the value of the securities in his hands. The broker neither executed the orders nor telegraphed his refusal to do so, and made no demand for further advances, but signified his refusal by letter written on the day of the receipt of the order, which was not received by the principal till two days after. The securities ordered to be sold depreciated, while the value of those ordered to be bought advanced, so that a large profit was lost. The broker subsequently sued his principal for advances on an open account with interest and commission. The principal counter-claimed for the loss arising from non-execution of his order, and recovered. The Court held² "that a broker is but an agent, and is bound to follow the directions of his principal, or to give notice that he declines to continue the agency. In the absence of a special agreement to the contrary, it is the principal's judgment, and not his, that is to control in the purchase and sale of stocks. The latter did not ask for any further advances by the order in question; he only directed a conversion or change of one stock into another. The plaintiff should have given prompt notice that he objected and declined to make the change. Telegraphic communication was used by the defendant, and no reason appears why the plaintiff could not have used the same. The delay caused by using the mail alone was inexcusable under the circumstances. The plaintiff charged ample compensation for his services, and was bound to act faithfully, fairly, and promptly. We think that he was liable for all the damages which the defendant sustained by his refusal to change the stocks," both for the loss on the refusal to sell and the loss on the refusal to purchase.

This reasoning is not wholly satisfactory. Agreed that "a Reasoning broker is but an agent," and that he "is bound to follow the considered.

¹ 129 U. S. (22 Davis), 193. *White v. Smith*, 54 N. Y. 522, is a very different case. There, there was a special agreement, and a margin; moreover, the stockbroker acted without orders or against the orders of his principal, while "the very nature of the whole transaction was such that the plaintiff could not be required to advance any funds so long as he kept his margin good."

² L. c. at 198.

directions of his principal," *within the scope of his agency*, "or to give notice that he declines to continue it," the material point, whether the direction in the case is within the scope of agency, is missed. Again it may be very true that, in questions of agency, "it is the principal's judgment that is to control in the purchase and sale of stocks;" the proposition, however, assumes the existence, in the matter of the sale and purchase ordered, of the continued relation of principal and agent after the principal's funds and credit are exhausted, and in the absence of any express engagement of the agent to undertake further responsibilities. The whole point is, whether, when a purchase has been made and the thing purchased has become subject to the rights of another in excess of its value, the principal in the transaction is as unfettered in his dealings with the purchased property, when subject to other rights, as he was when his money was in the hands of the agent waiting investment, with no rights other than his own attaching to it. The two positions are obviously not identical, yet they are treated as though they were.

Once more it is said, "Telegraphic communication was used by the defendant, and no reason appears why the plaintiff could not have used the same." Thus a duty either promptly to act on instructions from the purchaser and debtor, or to notify refusal to act, even when the broker is not in funds, and so long as any security remains in the broker's hands, is assumed to be of the essence of the relation between the broker and his debtor, the customer; or a conclusion is drawn from the premises—viz., *therefore* there was a duty to answer by telegram—which is far from flawless, either formally or legally.

Yet again the Court affirms, "The plaintiff charged ample compensation for his services, and was bound to act faithfully, fairly, and promptly." Many a man has charged and been paid amply for past services who was under no obligation to undertake future ones. The material point is rather, what the course of dealing in the business or between the parties was. The fact found as to this was, that plaintiff "was to receive commissions on the purchases and sales and interest on the advances;" that is, he was to be allowed to increase his debt by jeopardizing the security on the faith of which he was allowed to incur it. This in ordinary parlance is scarcely "ample compensation." After it is established that the plaintiff was bound to act, and in the way contended for, it follows he must be held to faith, fairness, and promptitude. The reasoning of the Court, however, assumes the whole point at issue. Tested, then, by logic, the reasons for the decision are very unsatisfactory.

Legal position
considered.

From the point of view of law the decision does not seem more sustainable. The telegram either signified a fresh order or was a fresh stage in a course of dealings. If a fresh order, then there was no duty on the plaintiff to regard it in any way. No one by a mere proposal can impose a positive contractual duty on a non-assenting person. If available, the order must be so by being in furtherance of contractual obligations already accrued. What the contractual obligation was is found as a fact—viz., for the plaintiff “to hold the stocks purchased for defendant in his own name as collateral security for any balance due to him.”¹ It was further found as a fact that “the defendant at the time of sending his telegram to the plaintiff was owing him more than \$4000 for advances, commissions, and interest, over and above the market value of the stocks then held by him for the defendant.”²

Thus, by the contract the plaintiff, the broker, held as a pledge³ all the securities in his hands, with a margin of \$4000 against him, while at common law he had a lien⁴ on them.

Now the claim of the defendant must be dependent on his shewing a right to direct further dealings with these securities unless plaintiff notified his refusal to deal with them; and it appears that if a refusal were notified, the plaintiff's right was unassailable. Further, the defendant's claim was not based on a special contract between the parties; for the judgment of the Court assumes the “absence of a special agreement.” The case then turns on principles of general application. Now where property is held subject to a pledge or lien, the depositor has no power of dealing with it, except as to his reversionary interest, without previously paying the sum for which it is detained as security.⁵

¹ *L. c.* at 197.

² *Ibid.*

³ “A bailment of personal property as security for some debt or engagement:” Story, *Bailm.* § 286. Sir William Jones's definition, *Bailm.* 117, is: “A bailment of goods by a debtor to his creditor, *to be kept till the debt is discharged.*” In *Markham v. Jaudon*, 41 N. Y. 235, it was held that the relation of broker and customer under the ordinary contract for a speculative purchase of stocks, is that of pledgee and pledgor; see also at 243, where the earlier decisions are considered. *Markham v. Jaudon* was followed in *Baker v. Drake*, 66 N. Y. 518.

⁴ *Jones v. Peppercorne*, Johns. Ch. 430, at 441; *Brandaö v. Barnett*, 12 Cl. & F. 787. “A lien in general may be defined to be a right of retaining property, until a debt due to the person retaining it has been satisfied.” Benjamin, *Contract of Sale* (4th ed.), 807, citing *Hammonds v. Barclay*, 2 East 227, at 235.

⁵ *Cummock v. Newburyport Savings Institute*, 142 Mass. 342. The judgment of Vaughan, J., in *Owen v. Knight*, 4 Bing. N. C. 54, seems very much in point. It is as follows, at 57: “The deed” (in this case the security) “is in the defendant's hands, with the plaintiff's assent, upon an advance of money by the defendant; and the plaintiff is not entitled to the possession, till the money has been repaid. The defendant has a right to set up his lien, and that shews that the plaintiff is not entitled to possession. The cases of *White v. Gainer* (2 Bing. 23) and *Boardman v. Sill* (1 Camp. 410 n.) shew that the defendant does not waive his lien, because he omits to mention it.” See also *Brandaö v. Barnett*, 1 M. & G. 908, 12 Cl. & F. 787; *Richards v. Symons*, 8 Q. B. 90; *Dorrington v. Carter*, 1 Ex. 566.

If then the defendant had no power of dealing with the security, it does not appear how he could create a right to deal with it by assuming to exercise a power which, so far as he was concerned, was non-existent, save in an event, payment of his debt, which never happened.

Law of Agency where there is a foreign principal stated by Buller, J.

Distinguished.

Finding of fact that there was no course of dealing requiring the plaintiff to buy fresh stocks.

Expressum facit cessare tacitum.

On the other hand, there may be urged the operation of a principle most familiar in insurance cases, in which it is rendered specially applicable by the peculiar circumstances of the relation between the foreign merchant and his agent. This principle, as stated by Buller, J.,¹ is that "where a merchant abroad has no effects in the hands of his correspondent, yet, if the course of dealing between them be such, that the one has been used to send orders for insurance, and the other to comply with them, the former has a right to expect that his orders for insurance shall still be obeyed, unless the latter give him notice to discontinue that course of dealing." In the case put, supposing the non-existence of any express contract, the agent would still be liable on the principle of estoppel.² The merchant would have been lured into dispatching his vessel uninsured on the faith of a representation by his agent that the vessel was insured, and his position would be worse in so far as his property was jeopardized or lost. But in the case in question the principal has merely lost the opportunity of speculating with another person's funds, primarily at another person's risk—a right which might be secured by contract, but which is scarcely one ordinarily raised without clear contractual obligation. That the present is not a case in which an actual contractual obligation had been incurred is plain not only from the absence of any finding of fact that this was the contract between the parties, but from the very material circumstance that there was a finding of fact the other way: "I do not in the examination of the record and testimony find any contract or understanding requiring the plaintiff to do it"; i.e., "to dispose of certain securities held by him, and to take another in place of it";³ and though the Supreme Court drew another inference from the facts, they did not find other facts. In the absence, then, of any provision in the contract obliging the plaintiff to sacrifice his security or to make advances, the term of the contract empowering the plaintiff "to hold the stocks purchased for defendant in his own name as collateral security for any balance due to him" becomes very material.

The maxim of law is *expressum facit cessare tacitum*, or *expressio*

¹ Smith v. Lascelles, 2 T. R. 187, at 189.

² Carr v. London and North-Western Railway Company, L. R. 10 C. P. 307.

³ Galigher v. Jones, 129 U. S. (22 Davis), at 198.

unius est exclusio alterius.¹ As the contract gives the plaintiff the stocks as security, it would be nullifying the terms of it to read in a condition that the party contracting to have security is either not to have it at all, or *sub modo* and not *simpliciter*.

Apart from the terms of a contract, and apart from actual misleading where there is a duty to make a communication, the mere refraining from communicating with another never gives rise to an actionable wrong.² The fact that the pledgor is permitted to deal with the pledged property will not establish a right for him to do so; or else the greater the indulgence of the pledgee, the less his rights, the greater the allowance to the pledgor, the more he becomes entitled to demand.³ The rights of pledgor and pledgee are fixed by contract, and a reference to the terms of the contract between them will, in the absence of actual waiver, at any time suffice to restrict indulgences within their limits. Consideration of the relation between a mortgagee with a mortgagor in possession should make this plain, or indeed any case of hypothecation—that is, a case where the pledgor remains in possession of the property pledged. That such a contract as is here alleged can be made is not disputed. The conclusion sought to be enforced is that, as a general rule, apart from special facts, the relation of stockbroker and customer does not warrant the client in counting on dealing with bonds held as securities and the continuance of his credit till he is notified to the contrary.⁴

Generally no legal duty, apart from contract, to answer letter.

Conclusion.

¹ Co. Litt. 210 a; Goodall's Case, 5 Co. Rep. 95 b, at 97 a; 2 Parsons, Contracts (6th ed.), 515.

² Cp. Wiedemann v. Walpole (1891), 2 Q. B. 534.

³ Cp. North-Western Bank v. Poynter (1895), App. Cas. 56.

⁴ See Davis v. Howard, 24 Q. B. D. 691. The case we have been considering is scarcely less interesting for its treatment of the law of damages than for the principal position it maintains. Bradley, J., in Galigher v. Jones, 129 U. S. (22 Davis), at 201, states the English rule to be: "Where there has been a loan of stock and a breach of an agreement to replace it" (it thus appears the court treated the retention of the "securities" as a conversion), "the measure of damages will be the value of the stock at its highest price on or before the day of trial." As against this, the Supreme Court of the United States, adopting the rule of the State of New York, have held that it is "the highest intermediate value of the stock between the time of its conversion, and a reasonable time after the owner has received notice of it to enable him to replace the stock." It may be observed with regard to this latter rule that it is perfectly satisfactory where the owner is either in funds or in credit and able to supply the stock, but assuming the conversion of the whole of his funds, the reason at the base of the rule is not wholly convincing. As to the English rule, the learned judge has not apprehended it rightly, and this is the more singular since he cites the authorities which formulate it. The measure of damage by English law in the case put is the price at the day when the stock ought to have been replaced, or the price at the day of trial, at the option of the plaintiff, *excluding, however, the highest price at any intermediate day*: McArthur v. Lord Seaforth, 2 Taunt. 257. In the subsequent case of Loder v. Kekulé, 3 C. B. N. S. 128, at 133, the Common Pleas distinguished this case, while recognising its authority, from the case of breach of contract by delivering goods of a quality inferior to that contracted for, saying, "In the case of a loan of stock the borrower holds in his hands the money of the lender, and thereby prevents him from using it altogether. Here the plaintiff had his money in his possession, and he might have purchased other bacon" (the goods in dispute) "of the like quality the very day after the contract was broken; and if he has sustained any loss by neglecting to do so, it is his own fault." McArthur v. Lord Seaforth is also explained by Bowen, L.J., in Williams v. Peel River Land and Mineral Company, Ltd., 55 L. T. 689, at 693; and see Simmons v. London Joint Stock Bank (1891), 1 Ch. 270, at 284. See Sedgwick, Damages, vol. ii. (7th ed.) 376-389.

CHAPTER II.

MEDICAL MEN.¹

Medical and surgical practitioners at common law.

At common law every man might use what calling he pleased;² and the practice of medicine and surgery not being regarded as a trade, and so requiring an apprenticeship, was open more widely than any handicraft.

3 Hen. VIII.
c. 11.

The earliest statutory regulation of medical and surgical practice was by 3 Hen. VIII. c. 11; by which no person was allowed to practise as a physician or surgeon within London or seven miles thereof without examination or licence. This Act applied equally to physicians and surgeons.

I. Physicians.

I. The first class of medical practitioners here referred to is that of physicians. Physicians are concerned with that division of practice which combats diseases by the application of medicines, and not by operative treatment.

This branch of the medical profession was incorporated by charter of Henry VIII. in the year 1519, which was embodied in and extended by an Act of Parliament (14 & 15 Hen. VIII. c. 5). A legal controversy of considerable intricacy (which there is no need to consider in detail here), was waged as to the effect of this Act;³ the conclusion of which may be shortly stated to be that the common law right of practising the profession of physic is

¹ For a concise history of medicine and the medical profession, see articles in the *Encyclopædia Britannica* (9th ed.), "Anatomy, History of Anatomy," and "Medicine, Part II., History." The history of medicine is most elaborately treated by Sprengel, *"Histoire de la Médecine depuis son origine jusqu'au XIV^{me} Siècle, traduite par Jourdain,"* 7 vols. 8vo. (1815). See the articles "Hippocrate," "Galen," "Avicenne," "Paracelse," "Vesale," and "Bichat," in Michaud, *Biographie Universelle*; also Hallam, *Literature of Europe*, the sections on "Anatomy and Medicine." See, too, Sir William Hamilton's article on the "Revolutions of Medicine," in "Discussions on Philosophy and Literature" (3rd ed.) 239. Buckle, "History of Civilisation" and "Miscellaneous and Posthumous Works" may be referred to for many curious particulars, *passim*. The history of medical men in England is well treated in Paris and Fonblanque, "Medical Jurisprudence," vol. i. The chapter in this work on the "literary history" of poisons is extremely interesting: vol. ii. 131. Willcock, "Laws relating to the Medical Profession," may also be consulted.

² 1 Bl. Comm. 427.

³ See *Dr. Bonham's Case*, 8 Co. Rep. 107 a, 114 a; *College of Physicians v. Dr. West*, 10 Mod. 353.

left unaffected by anything save the condition that the practitioner must be competent; of which competency the President and College of Physicians are the judges; so that it is their duty to admit every person whom, upon examination, they think fit to be admitted; and not only has the candidate himself, if found fit, a personal right, but the public has also a right to his services.¹ This duty of admission, being a judicial power requiring the exercise of discretion, cannot be delegated,² but requires to be exercised by the president and fellows, or the majority of those present, in the same manner as at the election of a fellow; though it is competent for the body at large to appoint particular persons of their own number to have the immediate direction of it; since the process of examination can be conducted by few only at the same time.³

II. The second class of medical practitioners is that of surgeons. II. Surgeons. Their peculiar practice consists in the use of surgical instruments and in the cure of outward diseases, whether by external applications or by external or by internal medicines.

The Act of 3 Hen. VIII. applies to these also. By that Act ^{3 Hen. VIII. c. 11.} alone can punishment be inflicted on a person for practising surgery without licence in any part of the kingdom except within London and Westminster and seven miles around these cities.⁴ The Act provides for a penalty of £5 for every month during which he may so practise. Though unrepealed this Act is practically obsolete, since there is no instance of any person having obtained a licence under it for several centuries.⁵

The Guild of Barbers had been incorporated in 1461. In ^{Incorporation of barber-surgeons.} 1541 the Guild of Barbers and the Society of Surgeons were amalgamated under the name of the Mystery and Commonalty of Barbers and Surgeons of London by 32 Hen. VIII. c. 42.⁶ ^{32 Hen. VIII. c. 42.} They received charters of privilege from James I. and Charles I. The surgeons' branch was, however, separated from the barbers' branch of the union by 18 Geo. II. c. 15, which relieved its ^{18 Geo. II. c. 15.} members from the necessity of obtaining the licence under 3 Hen. VIII., and gave them an exclusive right to practise in

¹ *Rex v. Askew*, 4 Burr. 2186.

² Vin. Abr. Deputy 2, citing Bro. Abr. Deputie, 19.

³ *Rex v. Askew*, 4 Burr. 2186. The duty of a medical school to its students (in the case cited—women) is discussed very fully in *Cadells v. Balfour*, 17 Rettie 1138.

⁴ 18 Geo. II. c. 15.

⁵ Willcock, *Laws relating to the Medical Profession*, 58. Cp. *Davies v. Makuna*, 29 Ch. Div. 596. *D'Allax v. Jones*, 26 L. J. Ex. 79, was on a point of pleading, and does not seem to have been carried further, so that the point was not argued, that since the Bishop of London and the Dean of St. Paul's have ceased to hold examinations in London, or the bishops in their dioceses, compliance with the statute was impossible.

⁶ As to these see Stow, *Survey of London* (6th ed.), vol. ii. 295.

and about London, and a concurrent right, with those licensed by the ordinary, of practising in all other parts of the kingdom.

The effect of 18 Geo. II. c. 15, seems to be to confine the right to practise surgery in London and seven miles round to those examined and admitted by the College of Surgeons. It divides those practising in the rest of the kingdom into two classes—

First, members of the College of Surgeons; who may practise in every part of the dominions of the Crown.¹

Secondly, surgeons licensed under 3 Hen. VIII.; who may practise in any particular diocese in which they are licensed, except within London and Westminster and seven miles round.²

III. Apothecaries.

III. A third class of medical practitioners is that of apothecaries. The business of an apothecary was concerned with the mixing and dispensing of drugs, and was anciently carried on by grocers in conjunction with their ordinary business. It was only in 1615 that grocers and apothecaries were formed into distinct corporations. Even subsequently to this period the Apothecaries' Company was looked upon as a mere trading company, and whoever thought fit to do so was at liberty to sell physic throughout the rest of the kingdom, provided he had conformed to the provisions of the Act of 5 Eliz. c. 4, about apprentices. Besides this, apothecaries on occasion prescribed the medicines they sold; a practice called in question by the College of Physicians, though held lawful by the House of Lords, overruling the Courts below³ in the case of the College of Physicians *v.* Rose.⁴

The Apothecaries Act, 1815.

In 1815 was passed the Apothecaries Act, 1815,⁵ "thus," as Willcock says,⁶ "for the first time, placing them as a body on the footing of a liberal profession."

Scope of the Act indicated in *Davis v. Makuna*.

The Apothecaries Act, 1815, not only imposes a penalty for practising without the certificate of the court of examiners constituted by the Act,⁷ but renders the act of practising without the certificate unlawful.⁸ Cotton, L.J., in *Davis v. Makuna*,⁹ thus indicates its scope: "The Act does not define the nature of an

¹ As to this, see *Smiles v. Belford*, 1 Upp. Can. App. 436, and the Medical Act, 1886 (49 & 50 Vict. c. 48), ss. 6, 24, 25.

² Willcock, *Laws relating to the Medical Profession*, 64. A physician who acts as a surgeon can recover for his services: *Little v. Oldaker*, Car. & M. 370; also *Battersby v. Lawrence*, Car. & M. 277.

³ 3 Salk. 17, 6 Mod. 44.

⁴ (1703) 5 Bro. Parl. Cas. 553.

⁵ 55 Geo. III. c. 194. See *Rex v. Kilderby*, 1 Wms. Saund. 308, note (b), at 309, 1 Wms. Notes to Saund. 511, and note (c), at 513; *Apothecaries Company v. Jones* (1893), 1 Q. B. 89, is a decision on the 20th sec. of the Act, that one penalty only can be recovered, though three several patients are treated on one day.

⁶ *Laws relating to the Medical Profession*, 19.

⁷ Sec. 20.

⁸ Sec. 14. As to an apothecary's qualifications, *Wogan v. Somerville*, 7 Taunt. 401. As to what constitutes practising, *Woodman v. Ball*, 6 C. & P. 577.

⁹ 20 Ch. Div. 596, at 606.

apothecary's employment, but dispensing, mixing medicine, giving medical advice, and attending the sick as medical adviser must be considered acting as an apothecary." The limitation expressed by Cresswell, J.,¹ must not be disregarded: "The mere fact of the defendant's having supplied medicines, does not necessarily shew that he practised as an apothecary; for a surgeon may lawfully do that, if the medicines are administered in the cure of a surgical case. If, for instance, in the case of a broken leg it becomes necessary to administer medicine, no doubt the surgeon may lawfully do so; but, on the other hand, if a surgeon takes upon himself to cure a fever, he steps out of his lawful province, and is not authorised to administer medicine in such a case."² It does not appear that there is any difference between the prohibition of an act under a penalty (not being one merely for revenue purposes) and an enactment declaring it absolutely unlawful; since in both cases they are things "forbidden and absolutely void to all intents and purposes whatsoever."³

Limitation expressed by Cresswell, J.

No difference between prohibition under a penalty and an absolute prohibition.

By the Medical Act, 1858, and its amending Acts⁴ a system of registration of medical practitioners is provided for, so that none other than registered persons shall be entitled to claim the title of legally or duly qualified medical practitioners;⁵ nor to recover any charge in any court of law for any medical or surgical advice or attendance,⁶ or for the performance of any operation, or for any medicine which they have both prescribed and supplied;⁷ nor to hold any of the Government or other medical appointments specified in the Act;⁸ nor to sign any certificate required by Act of Parliament to be signed by a medical practitioner;⁹ and any one assuming a title implying that he is registered is liable to a fine of £20.¹⁰

Registration.

¹ Apothecaries' Company v. Lotinga, 2 Moo. & R. 495, at 499.

² Allison v. Haydon, 4 Bing. 619, 3 C. & P. 246; Leman v. Fletcher, L. R. 8 Q. B. 319, as to effect of the Medical Act, 1858, on the Apothecaries Act, 1815.

³ Per Lord Chancellor Hatherley, *In re* Cork and Youghal Railway Company, L. R. 4 Ch. 748 at 758; Taylor v. Crowland Gas and Coke Company, 10 Ex. 293; Mellias v. Shirley Local Board, 16 Q. B. D. 446, at 454; Harris v. Runnels, 12 How. (U.S.) 79.

⁴ 21 & 22 Vict. c. 90, amended by 22 Vict. c. 21; 23 & 24 Vict. cc. 7 and 66; 25 & 26 Vict. c. 91; 31 & 32 Vict. c. 29; 38 & 39 Vict. c. 43; 39 & 40 Vict. cc. 40 and 41; 49 & 50 Vict. c. 48.

⁵ The Court of Queen's Bench have held that the registration to be effectual must be before action brought: Leman v. Houseley, L. R. 10 Q. B. 66; though not necessarily at the time of the attendances: Turner v. Reynall, 14 C. B. N. S. 328. See, however, as to this last case, Howarth v. Brearley, 19 Q. B. D. 303. A book, purporting to be a copy of the Medical Register pursuant to 21 & 22 Vict. c. 90, and professing to be "published and sold at the Office of the General Council of Medical Education and Registration" is admissible under s. 27, *Pedgrift v. Chevallier*, 8 C. B. N. S. 240.

⁶ *De la Rosa v. Prieto*, 16 C. B. N. S. 578; Leman v. Houseley, L. R. 10 Q. B. 66; Howarth v. Brearley, 19 Q. B. D. 303.

⁷ *Wright v. Greenroyd*, 1 B. & S. 758.

⁸ Sec. 36.

⁹ Sec. 37.

¹⁰ Secs. 40-43. *Ellis v. Kelly*, 6 H. & N. 222.

Medical Act,
1886.

By section 6 of the Medical Act, 1886,¹ "a registered medical practitioner shall, save as in this Act mentioned, be entitled to practise medicine, surgery, and midwifery in the United Kingdom and (subject to any local law) in any other part of Her Majesty's dominions, and to recover in due course of law in respect of such practice any expenses, charges, in respect of medicaments or other appliances, or any fees to which he may be entitled, unless he is a fellow of a college of physicians the fellows of which are prohibited by bye-law from recovering at law their expenses, charges, or fees, in which case such prohibitory bye-law, so long as it is in force, may be pleaded in bar of any legal proceedings instituted by such fellow for the recovery of expenses, charges, or fees." This proviso refers to the practice of physicians, whose employment, like that of barristers,² had always previously been held to be of a merely honorary description,³ and not to support an action for fees unless by virtue of a special contract.⁴

34 & 35
Hen. VIII.
c. 8.

Richardson,
C.J.'s, inter-
pretation of
the Act.

The Act of 34 & 35 Hen. VIII. c. 8, providing that persons, being no common surgeons, may minister medicines notwithstanding the statute,⁵ has an important bearing on what has gone before. The effect of it is summed up by Richardson, C.J., in *Le Colledge de Physitians Case*⁶ as follows:—"We are of opinion, that this statute⁷ does not extend, either in words or intent and meaning, to give liberty to any person to practise or exercise for gain or profit; it is evident from the preamble, and also the statute, that it was directed principally against surgeons who were covetous, &c. And therefore the statute has limited who shall practise, and for what diseases; and the parties licensed are such persons as shall be good honest people, as old women, and such as are inclined to give their neighbours physic through charity and piety, and not those who expect gain from it, as empirics, who do nothing in piety and charity; so that this statute excludes all who take any money or gain."⁸

¹ 49 & 50 Vict. c. 48. *Attorney-General v. Apothecaries' Hall*, 21 L. R. Ir. 253, deals with the Irish Medical Schools.

² *Post*, 1445.

³ *Ante*, 922, n. 4.

⁴ *Veitch v. Russell*, 3 Q. B. 928; *Chorley v. Balcot*, 4 T. R. 317. Cp. *Gibbon v. Budd*, 2 H. & C. 92, as to presumption. This, however, does not extend to surgeons; *Lipscombe v. Holmes*, 2 Camp. 441; *Baxter v. Gray*, 4 Scott. N. R. 374; *Simpson v. Ralfe*, 4 Tyr. (Ex.) 325; *Richmond v. Coles*, 1 Dowl. Prac. Cas. (N. S.) 560. Physicians can sue in America: see the somewhat declamatory judgment in *Judah v. McNames*, 3 Blackf. (Ind.) 269. In *Leighton v. Sargent*, 27 N. H. 460, it is laid down that a medical man may bind himself to be responsible for results.

⁵ *I.e.*, 3 Hen. VIII. c. 11.

⁶ Litt. (C.P.), 349. This case was twice previously argued, and is reported by Littleton, 168-173, 212-216, and 246-252. The translation of the passage from the judgment in the text is from Willcock, *Laws relating to the Medical Profession*, Appendix, at cx.

⁷ 34 & 35 Hen. VIII. c. 8.

⁸ Cp. the same case before the King's Bench on writ of error, *Butler v. President of College of Physicians*, 3 Cro. (Car.) 256, where the judgment of the Common Pleas was

Gratuitous practitioners are thus specifically excepted out of the operation of the statutes. Even under the statutes the only right of action is for the penalties prescribed by them. The unqualified practitioner is not able to recover his charges,¹ and is in no case able to set up a contract in evasion of the Acts.²

Here a distinction must be indicated between acts void between the parties for purposes of suit and acts illegal in themselves. This is pointed out in an American case,³ holding that though a physician is precluded from recovering for his services because he is unregistered, yet in an action for personal damage sustained by him he may recover for being rendered unable to continue his practice. If his practice were *per se* unlawful, he clearly could not recover in respect of it; and the ground of his being able to recover manifestly is that since his patients pay him voluntarily for his services, the amount of these voluntary payments becomes the measure of his gain from his practice and evidence of what his compensation should be.

Once more, though a surgeon not qualified under the Registration Acts may not be able to sue for his fees, it does not follow that he stands in the same position as an irregular practitioner under the Apothecaries Act, 1815, on a criminal prosecution for negligence. In the former case—if the Act of Henry VIII. is to be considered inoperative—his act, though void for all purposes of obtaining remuneration or benefit, is not illegal. Consequently when he is proved to have practised, and evil results to have followed from his practice, the conclusion is not that he is therefore liable without other evidence of negligence; for his act is not unlawful, and, though unregistered, he may be competent. In

affirmed; "admitting the 34 Hen. VIII. c. 8 be in force, yet they all resolved the defendant's plea was naught, and not warranted by the statute; for he pleads that 'he applied and ministered medicines, plaisters, drinks, *ulceribus morbis et maladiis, calculo, strangurio, febribus et aliis in statuto mentionatis*;' so he leaves out the principal word in the statute, viz., '*externis*;' and doth not refer and shew, that he ministered potions for the 'stone, strangullion, or ague,' as the statute appoints to these three diseases only, and to no other. And by his plea his potions may be ministered to any other sickness; wherefore they all held his plea was naught." There is a well-known passage of Cicero discriminating *morbis*, disease, *ægrotatio*, illness, and *vitium*, defect, as follows:—*Morbum appellant totius corporis corruptionem ægrotationem; morbum cum imbecillitate; vitium, cum partes corporis inter se dissident; ex quo pravitas membrorum, distortio, deformitas. Itaque illa duo morbus et ægrotatio, ex totius valetudinis corporis conquassatione et perturbatione gignuntur; vitium autem integra valetudine, ipsum ex se cernitur.* (Cic. Tuscul. Quest. lib. iv. c. 13.) Modestinus's distinction is nester: *Morbum esse temporalem corporis imbecillitatem; vitium vero perpetuum corporis impedimentum.* (D. 50, 16, 101 § 2.)

¹ Steed v. Henley, 1 C. & P. 574; Allison v. Hayden, 4 Bing. 619. Compare Gremare v. Le Clero Bois Valon, 2 Camp. 144, with what was said in Cope v. Rowlands, 2 M. & W. 149, at 159; see also Taylor v. Crowland Gas Company, 10 Ex. 293; Melliss v. Shirley Local Board, 16 Q. B. D. 446.

² Davies v. Makuna, 29 Ch. Div. 596.

³ McNamara v. Village of Clintonville, 51 Am. R. 722; Holmes v. Halde, 43 Am. R. 567.

the case of practising under the Apothecaries Act, the action of practising is unlawful, and therefore the consequences are unlawful; for the law in effect says his act, however done, is incompetent, so that no further evidence is legally necessary to put the defendant to proof to exculpate himself, and, failing that, to entitle the Crown to judgment. The practical bearing of this view is less serious when it is borne in mind that some considerable negligence would be necessary to incur criminal consequences; and that, failing further evidence, the prosecution would drop, not because there was *no* evidence of negligence, but because there was *not sufficient* evidence to establish criminal negligence.¹

Civil
proceedings.

The same distinction prevails in civil proceedings. Where the character of the act is neutral in law—that is, not prohibited—injurious consequences flowing from it will not, without some evidence of negligence, import an actionable wrong; where the act is unlawful, the injurious result will be in itself actionable without positive evidence of negligence. In civil proceedings the consent of the plaintiff to employ a prohibited practitioner makes a further difference; for the general principle is undoubted, that courts of justice will not assist a person who has participated in a transaction forbidden by statute to assert rights growing out of it, or to relieve himself of the consequences of his own illegal act. Whether, then, the form of the action is in contract or in tort, the test in each case is whether, when all the facts are disclosed, the action appears to be founded in a violation of law in which the plaintiff has taken part.² The plaintiff's act is something like contributory negligence, without which the injury could not happen; but this, though a defence in an action, will not avail against the Crown.

Presumption in
favour of sur-
geon's compe-
tency.

Where the surgeon is registered, and injury results from his treatment, the presumption is that he is competent and the treatment correct till the contrary is shewn.³

Malpractice.

The negligence of medical and surgical practitioners is usually treated under the various heads of malpractice.⁴ Malpractice the

¹ For a definition of Criminal Negligence, see *ante*, 7.

² *Hall v. Corcoran*, 107 Mass. 251; *Cranson v. Goss*, 107 Mass. 439, both "Lord's day" cases.

³ *Regina v. Spencer*, 10 Cox C. C. 525.

⁴ *Elwell, Malpractice* (4th ed. 1881); Willcock, *Laws relating to the Medical Profession. Imperitia quoque culpa adnumeratur, veluti si medicus ideo seruum tuum occiderit, quod eum male secuerit aut perperam ei medicamentum dederit*: Inst. 4, 3, 7. See D. 9, 2, 7, § 8. The cases under the Roman law of medicine given by mistake and through ignorance, and in what circumstances they are within the provisions of the *Lex Aquilia*, are treated in *Dissertationes Juridicæ Thomasi*, Diss. xi. De Jure Circa Somnum et Somnia in Delictis, §§ 4, 5, & 6, 768-770. In Long, *Decline of the Roman*

Court resolved, in *Dr. Groenvelt's Case*,¹ to be "a great misdemeanour and offence at common law (whether it be for curiosity and experiment or by neglect), because it breaks the trust which the party has placed in the physician, tending directly to his destruction." Into malpractice generally there is no call to enter here beyond the consideration of the relations constituted by malpractice caused through ignorance or remissness; for that large aspect which deals with malpractice "for curiosity and experiment" is wholly beyond the scope of the present book.

The principle of most extensive scope, prevailing through all Principle. classes of skilled labour, and not confined to medical practitioners, is that he who undertakes the public practice of any profession undertakes that he has the ordinary skill and knowledge necessary to perform his duty towards those resorting to him in that character.²

There is no distinction in law between those who are qualified No distinction between regular and irregular practitioners as to maltreatment. or regular practitioners and those who are not, in regard to maltreatment, whether from ignorance or negligence, when once maltreatment is established adequate to found either civil or criminal liability;³ for the wrongful act is the negligent or incompetent treatment, and not the want of qualification. From the same principle flows the consequence that, so far as concerns the attaching of liability, whether the service is remunerated or gratuitous, is immaterial.⁴ Still the standard of care and competency is perpetually variable. Negligence in one man may be competent care in another. For instance, a specialist consulted in his speciality would be liable for negligence in respect of treatment which in a junior and ordinary member of the profession would more than pass muster. Standard of care and competency perpetually variable.

The difficulty of fixing a standard is furthermore increased by Various schools of theory and practice. the many and conflicting schools of theory and practice. The law can enter into no minute examination of the merits of practice.

Republic, vol. ii. 19, is the following: "I find nothing about surgeons in the Roman army and yet broken limbs and ugly wounds would require more skill and attention than a soldier could have from his comrades. The *Fabri*, who were able to use their hands, might give some help; but it is hardly possible that there were no surgeons or physicians in a Roman army, when they were employed to look after the health and wounds of gladiators. Cæsar on one occasion speaks of delaying some days on a battlefield to look after the wounded, but he does not say how this was done." See for the arrangements made under the Empire, *Smith, Dictionary of Greek and Roman Antiquities* (3rd ed.) art. "*Exercitus*," "*Medici*." For the general history of Greek and Roman medicine, see the articles "*Medicina*" and "*Medicus*" in the same work. See also the note in *Rawlinson, Herodotus*, bk. ii. 84.

¹ 1 *Ld. Raym.* 213, at 214.

² *Seare v. Prentice*, 8 *East*, 348. *Ante*, 35 and 1365.

³ *Rex v. Van Butchell*, 3 *C. & P.* 629; *Rex v. Williamson*, 3 *C. & P.* 635; *Rex v. St. John Long*, 4 *C. & P.* 398 and 423.

⁴ *Per Heath, J.*, in *Shiells v. Blackburne*, 1 *H. Bl.* 158, at 161.

allopathy or homœopathy or any other system of treatment.¹ The tests it applies are—Is the practitioner a qualified man, and therefore presumably competent, or is he unqualified, and therefore presumably incompetent? If he is incompetent, the law infers that injury following treatment is the result of incompetency, and he must discharge himself of the *onus* of proving the injury was not the result of incompetency; if he is competent—that is, if he is a qualified and registered practitioner—injury subsequent to treatment must be shewn, and some evidence also must be given of negligence in treatment before liability can be affixed.²

Evidence of negligence.

Evidence of negligence is not determinable by an arbitrary standard. Given the presumptive competency of the practitioner, the standard of professional skill he is required to reach is that of the ordinary and average practitioner in the branch, or of the school, to which he professes himself to belong;³ for a person professing to follow one system cannot be expected to practise any other. Where the amount of skill displayed in treatment is in dispute, the evidence of an experienced practitioner of the school professed by the person charged is admissible to shew that the treatment was careful and skilful according to the standard of practitioners professing the tenets of the school.⁴

In the case of a quack.

If the practitioner is a quack, he runs the danger of being liable for gross negligence; which Willes, J., describes as consisting “in rashness, where a person was not sufficiently skilled in dealing with dangerous medicines which should be carefully used, of the properties of which he was ignorant, or how to administer a proper dose.”⁵ “A person,” the learned judge further says, “who, with ignorant rashness and without skill in his profession, used such a dangerous medicine acted with gross negligence.”⁶

¹ This is definitely held in an American case, where it was determined that the terms “physicians and surgeons” embrace homœopaths: *Raynor v. State*, 62 Wis. 289, United States, Digest. 1885, at 521. See *Patten v. Wigen*, 51 Me. 594.

² *Reg v. Spencer*, 10 Cox C. C. 525; Willcock, Law relating to the Medical Profession, 90.

³ *Corsi v. Maretzek*, 4 E. D. Smith (N. Y.) 1, Brightly, New York Digest, 2899, Wharton, Negligence (4th ed.), 733.

⁴ *Bowman v. Woods*, 1 G. Greene (Iowa) 441.

⁵ *Regina v. Markuss*, 4 F. & F. 356, at 358.

⁶ The distinction has been thus stated: “If a person assume to act as a physician, however ignorant of medical science, and prescribe with an honest intention of curing the patient, but through ignorance of the quality of the medicine prescribed, or the nature of the disease, or both, the patient die in consequence of the treatment, contrary to the expectation of the person prescribing, he is not guilty of murder or manslaughter. But if the party prescribing have so much knowledge of the tendency of the prescription that it may be reasonably presumed that he administered the medicine from an obstinate wilful rashness, and not with an honest intention and expectation of effecting a cure, he is guilty of manslaughter at least, though he might not have intended any bodily harm”: *Rice v. State*, 8 Mo. 561, cited in *State v. Schulz*, 39 Am. R. 187. See Bishop, Criminal Law (6th ed.), § 664, also § 314, n.

Where a divergence from the rules of the system of the majority exists, the test is whether the practitioner is a scientific inquirer, possessed of the principles of a system, and practising them (for knowledge without practice is unavailing), or a mere ignorant pretender; and this is for the jury.¹

In the case of an Act of Parliament making the practice of any person unlawful, he would have to shew that there is no connection between his unlawful practice and the injury following. If the practice is not unlawful, whatever the disabilities to sue may be, it is conceived that in being sued a practitioner stands in no worse position than a qualified man reasonably competent would occupy. To allow the fact of want of qualification to operate in diminishing the liability for negligence would be to give an advantage to unqualified practitioners. Each practitioner, whether qualified or unqualified then, is liable for *culpa levis*—the want of expert diligence.² The one is an expert, the other has put himself in the position of an expert.³ If the unqualified practitioner disclaims the skill of an expert previously to undertaking the treatment, then he is only liable for what, in the Roman law, is called gross negligence, *culpa lata*—that is, the lack of diligence and skill belonging to an ordinary unprofessional person of common sense.⁴

In illustration of this may be noted, a case which Sir William Jones cites⁵ from the Mahomedan law: "A man who had a disorder in his eyes, called on a *farrier* for a remedy; and he applied to them a medicine commonly used for his patients; the man lost his sight, and brought an action for damages; but the judge said: 'No action lies, for, if the complainant had not himself been an *ass*, he would never have employed a *farrier*.'" Or, as the law was stated by an English judge:⁶ "If the patient applies to a man of a different employment or occupation for his gratuitous assistance, who either does not exert his skill, or administers improper remedies to the best of his ability, such person is not liable" in damages. If, however, he applies to a *surgeon*, and he treats him improperly, he is liable to an action, even though he undertook *gratis* to attend to the patient, because his situation implies skill in surgery.⁷

¹ Cp. *Reg. v. Wagstaffe*, 10 Cox C. C. 530. See 31 & 32 Vict. c. 122 s. 37, repealed by The Prevention of Cruelty to and Protection of Children Act, 1889 (52 & 53 Vict. c. 44). The Queen v. Downes, 1 Q. B. D. 25; The Queen v. Morby, 8 Q. B. D. 571. See now The Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41).

² *Ante*, 1191.

³ *Jones v. Fay*, 4 F. & F. 525.

⁴ Wharton, *Negligence* (4th ed.), § 29. *Ante*, 35.

⁵ *Baillm.* 100.

⁶ Heath, J., in *Shiells v. Blackburne*, 1 H. Bl. 158, at 161.

⁷ *Seare v. Prentice*, 8 East, 348. In America it has been held that he who, knowing a medical man is of intemperate habits, yet continues to employ him, cannot set up such habits by way of defence to his bill: *M'Kleroy v. Sewall*, 73 Ga. 657, United States, Digest, 1886, at 506.

Irregular practitioner holding himself out as competent to treat diseases.

Sir Matthew Hale's opinion in his "Pleas of the Crown."

Accepted as correct by Pollock, C.B., in *Regina v. Crick*.

Mere unlawfulness of the unauthorized practitioner's act would not affect with criminal consequence.

The irregular practitioner who holds himself out as competent to treat diseases thereby represents that he has a similar amount of skill to those who are regularly qualified, and his performance must be decided by the same test. Anciently a distinction was sought to be set up between the malpractice of a regular and of an irregular practitioner by exacting from the latter even greater responsibility than from the former.¹ As to this Sir Matthew Hale, in his "Pleas of the Crown," says:² "If a physician gives a person a potion without any intent of doing him any bodily hurt, but with an intent to cure or prevent a disease, and contrary to the expectation of the physician it kills him, this is no homicide, and the like of a chirurgion, 3 E. 3 Coron. 163. And I hold their opinion to be erroneous, that think, if he be no licensed chirurgion or physician that occasioneth this mischance, that then it is felony, for physic and salves were before licensed physicians and chirurgions, and therefore, if they be not licensed according to the statute of 3 H. 8, cap. 11, or 14 H. 8, cap. 5, they are subject to the penalties in the statutes, but God forbid that any mischance of this kind should make any person not licensed guilty of murder or manslaughter." This view is accepted as correct by Pollock, C.B., in *Regina v. Crick*.³ "It is no crime⁴ for any one to administer medicine, but it is a crime to administer it so rashly and carelessly as to produce death; and in this respect there is no difference between the most regular practitioner and the greatest quack."⁵

The law therefore provides that where criminal consequences are concerned, the mere unlawfulness of the act of the unauthorized practitioner will not affect him with criminal consequences, on the ground of the distinction in amount between evidence of negligence and of criminal negligence;⁶ though in the case of his professing to act as a qualified practitioner, and thereby inducing a patient to submit to his treatment, not know-

¹ 4 Co. Inst. 251, quoting Bracton, "that if one that is not of the mysterie of a phyitian or chirurgion, take upon him the cure of a man and he dieth of the potion or medicine, this is (saith he) covert felony." See also 1 East Pleas of the Crown 264. Sect. iv. in this work, 260-271, is on "Homicide from Impropriety, Negligence, or Accident in the Prosecution of an Act lawful in itself, or intended by way of Sport or Recreation." *Ante*, 121.

² Vol. i. 429.

³ (1859) 1 F. & F. 519. The same is the law in America, *Commonwealth v. Thompson*, 6 Mass. 134.

⁴ As to Criminal Negligence, see *ante*, 7 and 1396. There is a full discussion of what is required to constitute criminal negligence in a medical man in *Commonwealth v. Pierce*, 138 Mass. 165, 52 Am. R. 264. See, too, *State v. Hardister*, 42 Am. R. 5.

⁵ *Cp. Rex v. Williamson*, 3 C. & P. 635; *Regina v. Chamberlain*, 10 Cox C. C. 486, before Blackburn, J., where the prisoner was acquitted; and *Regina v. Crook*, 1 F. & F. 521; *Rex v. Senior*, 1 Moo. C. C. 346, where there were convictions.

⁶ *Cp. Rex v. Van Butchell*, 3 C. and P. 629; and per Park, J., in *Rex v. St. John Long*, C. & P. 398.

ing of his legal incapacity, in the event of injury following, proof of his absence of legal qualification is sufficient to cast on him the *onus* of shewing that the injury did not result from his treatment. The opinion of Bayley, J., in *Rex v. Nancy Simpson*¹ seems inconsistent with this view. He regards the undertaking to administer medicine "which may have a dangerous effect," and "where professional aid might be obtained," when the administration occasions death, as in itself evidence of negligence so gross as to found a criminal liability.² This principle of liability is, notwithstanding, too wide; since the administration, though followed by death, may be perfectly consistent with the strictest prudence and the rules of art; and on proof of this, though professional aid could have been obtained, and though a dangerous effect was produced, the presumption of negligence is effectually rebutted.

Opinion of Bayley, J., in *Rex v. Nancy Simpson*.

The fact of qualified assistance being available is undoubtedly of great weight in the determination of the character of an irregular practitioner's act; though it does not seem consistent with principle to regard it as an infallible test of negligence, as appears to be done by Bayley, J., in the case under consideration, and by Lord Lyndhurst, C.B., in *Rex v. Webb*.³ It is rather a circumstance from which gross negligence will most usually be inferred than an actual indication of negligence apart from the circumstances. Thus, the fact of the patient dying under treatment will doubtless raise a presumption of negligence even criminal, though the presumption raised is rebuttable.⁴

Effect of proper assistance being at hand.

The case frequently arises of a licensed practitioner having an unqualified assistant. The want of qualification in the one is not eked out by the possession of it by the other. In some cases the principal is affected with a criminal liability, where, through his negligence, his assistant's incompetency works harm. This is pointed out by Hawkins, J., in *Pharmaceutical Society v. Wheeldon*.⁵ "We need hardly say that, if mischief arose by reason of a master negligently leaving an unqualified person in charge of his poisons, no punishment of the assistant under s. 15 would exonerate the master from his civil liability to any person

Unqualified assistant of licensed practitioner.

¹ 4 O. & P. 407, n.

² Bolland, B., in *Rex v. Spiller*, 5 C. & P. 333, says at 336: "If any person, whether he be a regular or licensed medical man or not, professes to deal with the life or health of his Majesty's subjects, he is bound to have competent skill to perform the task that he holds himself out to perform, and he is bound to treat his patients with care, attention, and assiduity." As to the latter part it is clearly so. But if a man without competent skill treat a patient, he is neither liable to indictment nor action, unless he does him injury. And if he injures him, the liability is not for being incompetent, but for causing injury.

³ 1 Moo. & R. 405.

⁴ Bishop, Criminal Law (6th ed.), § 664.

⁵ 24 Q. B. D. 683, at 690. This is a case under the Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 15.

injured, nor, if death ensued through such negligence (if a jury found it to be of a criminally culpable character), would he be exonerated from a liability to a charge of manslaughter."

Where treatment involves danger, the patient must have a communication made, and signify assent to its application.

It is, moreover, clear that treatment involving probabilities of danger cannot be applied to a patient, whether by a licensed or unlicensed practitioner, without some communication to the patient, and some expression or signification of consent by him. The duty in this respect was treated so long ago as in *Slater v. Baker and Stapleton*.¹ Plaintiff employed the defendants, one of whom was a surgeon, the other an apothecary, to cure his leg, which had been broken and set, and the callus of the fracture formed. The defendants disunited the callus, and Baker fixed on the plaintiff's leg a heavy steel instrument with teeth to stretch or lengthen the leg. It appeared from the evidence at the trial that it was improper to disunite the callus without consent, and heavy damages were given. The Court refused a motion to set aside the verdict, saying:² "It was ignorance and unskillfulness in that very particular to do, contrary to the rule of the profession, what no surgeon ought to have done; and, indeed, it is reasonable that a patient should be told what is about to be done to him, that he may take courage and put himself in such a situation as to enable him to undergo the operation." Yet to this information there must be a limit, and it appears reasonable to hold that the duty to forewarn the patient is discharged by a general intimation of likelihood of pain or danger arising in a particular direction, without a scientifically accurate specification of the probabilities to which the patient would be exposed.³

Operation on a married woman without the consent of her husband.

A surgeon is justified in performing an operation upon a

¹ 2 Wils. (C. P.) 359. As to what is to be looked for from a surgeon employed to set a leg, see *M'Candless v. M'Wha*, 22 Pa. St. 261, where Woodward, J., said at 267: "The implied contract of a physician or surgeon is not to cure—to restore a limb to its natural perfectness—but to treat the case with diligence and skill. The fracture may be so complicated that no skill vouchsafed to man can restore original straightness and length; or the patient may, by wilful disregard of the surgeon's directions, impair the effect of the best-contrived measures." "The principle is contained in the pithy saying of Fitzherbert that 'it is the duty of every artificer to exercise his art rightly, and truly as he ought.' This is peculiarly the duty of professional practitioners, to whom the highest interests of man are often necessarily intrusted. The law has no allowance for quackery. It demands *qualification* in the profession practised—not extraordinary skill such as belongs only to few men of rare genius and endowments, but that degree which ordinarily characterizes the profession. And in judging of this degree of skill in a given case, regard is to be had to the advanced state of the profession at the time." "The physician or surgeon who assumes to exercise the healing art is bound to be up to the improvements of the day. The standard of ordinary skill is on the advance; and he who would not be found wanting, must apply himself with all diligence to the most accredited sources of knowledge." The judge at the trial in charging the jury made some very curious observations, well worth referring to. See also *Almond v. Nugent*, 11 Am. R. 147.

² 2 Wils. (C. P.) at 362.

³ See *M'Clallen v. Adams*, 36 Mass. 336, where husband's authority to operate on wife is presumed. In the absence of evidence of consent the *onus* is on the plaintiff.

married woman with her consent if he deems it necessary for the prolongation of life, and the husband has no right to withhold from his wife such medical assistance as her case requires.¹ If the wife voluntarily submits to the operation, her consent will be presumed, unless she was the victim of a false and fraudulent misrepresentation, which is a material fact to be established by proof; so also it will be presumed in favour of the surgeon that he has exercised that due and ordinary care which is a duty imposed by law, and that the operation was carefully and skillfully performed.²

When adequate information has been given of the proposed treatment, and an indication of its danger or painfulness, it is not consistent with the authorities to say that in a civil action there are any other consequences attending the action of the unlicensed than of the licensed practitioner.³ The law being thus, much more is a practitioner free from liability when the injurious act is an act collateral to medical or surgical treatment, done by some third person.⁴

No greater liability of the unlicensed than the licensed.

No liability for collateral act of a third person.

Where a specific act of malpractice is charged, evidence is not admissible to shew that the defendant is of skill in his profession. This is obvious; since, first, the very nature of the charge involves either that he is of skill generally and did not exercise it, or that he represented himself to have skill which he did not in fact possess; and secondly, because the inquiry is not what he was able to do, but what he actually did. Where the evidence tendered is that the alleged malpractice is no more than a result from an ordinary and skilful way of performing the duty, it is, of course, otherwise, and the evidence is admissible.⁵

Specific act of malpractice.

The general rule of skill required from a medical or surgical practitioner was considered by Erle, C.J., in *Rich v. Pierpont*,⁶ who directed the jury to the following effect—that a medical man is certainly not answerable merely because some other practitioner might possibly have shewn greater skill and knowledge; he is bound to have a degree of skill and knowledge which is undefinable, but which must be a competent degree in the opinion of a jury. It is not enough that medical men of far greater experience or ability might have used a greater degree of skill, nor that the person charged himself might have used more care. The question is whether there has been “a want of competent care or competent skill” to such an extent as to lead to the bad

General rule of amount of skill required considered by Erle, C.J.

¹ *Harris v. Lee*, 1 P. Wms. 482. Of course such an operation is excluded, as *Boccaccio* indicates in his tenth novel of the ninth day.

² *State v. Housekeeper*, 70 Md. 162, 14 Am. St. R. 340, see note, at 349.

³ *Reg. v. Whitehead*, 3 C. & K. 202; *Reg. v. Spencer*, 10 Cox, C. C. 525; *Reg. Bull.* 2 F. & F. 201.

⁴ *Perionowsky v. Freeman*, 4 F. & F. 977.

⁵ *Holtzman v. Hoy*, 59 Am. R. 390.

⁶ 3 F. & F. 35.

result; or, as it was stated in an American case,¹ whether the amount of care and skill bestowed is up to "the average of the reasonable skill and diligence ordinarily exercised by the profession as a whole, not that exercised by the thoroughly educated, nor yet that exercised by the moderately educated, nor merely of the well-educated, but the average of the thorough, the well, and the moderate—all, in education, skill, diligence, &c.;" and to this must be added, with allowance for particular circumstances of position, whether urban or rural, near a centre of population or remote.

Not to have reference to the particular constitution.

Hancke v. Hooper.

The want of care and skill must be in the treatment itself, and not in the treatment with reference to the particular constitution or circumstances of the patient, unless the treatment presupposes that knowledge. Thus, in *Hancke v. Hooper*,² the plaintiff, a whitesmith, walked into the shop of the defendant, a surgeon, and asked to be bled, saying that he had found relief from it before. He was bled by the apprentice, and experienced considerable evil effects, for which he sued. Tindal, C.J., directed the jury³ that "if, from some accident or some variation in the frame of a particular individual, an injury happen, it is not a fault in the medical man. It does not appear that the plaintiff consulted the defendant as to the propriety of bleeding him; he took that upon himself, and only required the manual operation to be performed. The plaintiff must shew that the injury was attributable to want of skill; you are not to infer it. If there were no indications in the plaintiff's appearance that bleeding would be improper, the defendant would not be liable for the bleeding not effecting the same result as at other times, because it might depend on the constitution of the plaintiff."⁴

Improper treatment a ground of defence.

Improper treatment is also a ground of defence to an action for fees for professional attendance. As Lord Kenyon said:⁵ "If a man is sent for to extract a thorn which might be pulled out with a pair of nippers, and through his misconduct it becomes necessary to amputate the limb; shall it be said, that he may come into a court of justice to recover fees for the cure of that wound which he himself caused?"⁶

Aggravation of injury by patient's own act.

If the patient has aggravated his injuries⁷ by his own conduct to an extent that will account for the mischief complained of, he

¹ *Smothers v. Hanks*, 11 Am. R. 141.

² 7 C. & P. 81. *Vanmere v. Farewell*, 12 Ont. R. 285; *M'Quay v. Eastwood*, 12 Ont. R. 402.

³ 7 C. & P., at 84.

⁴ *Bowater v. Smith*, 3 Times L. R. 187, was a case where an action was brought against a chemist for supplying a poisonous drug by mistake, where the plaintiff recovered damages. *Ante*, 58.

⁵ *Kannen v. M'Mullen, Peake* (N. P.) 59.

⁶ *Basten v. Butter*, 7 East 479. Since the Judicature Acts the defendant can counterclaim for the loss of his limb.

⁷ *Ante*, 114.

cannot recover damages from the medical man in respect of treatment differing from the ordinary rule, on the principles applicable to the law of contributory negligence. If, however, the injury resulting from the patient's want of care can be separated from the effects of the doctor's incompetence or neglect, there is nothing to prevent recovery for injury thus isolated.¹

In the absence of express contract, a medical man clearly does not undertake for the infallibility of his treatment, and therefore he is only to be held to undertake to perform what can be ordinarily done in similar circumstances; thus, if a registered practitioner sues for his fees, and is met with the defence that his treatment was ineffectual, this is no defence to the claim.² Neither is it an answer that his treatment was mistaken; unless, also, it is shewn to have been negligently or ignorantly so. If the medical man has employed the ordinary degree of skill current in his profession, he is entitled to his remuneration, though it has failed of its effect.³ A mistake in an opinion given when asked for, and after examination does not indicate recklessness, and for error in opinion a medical man is not liable.⁴

Want of
success no
test of
efficiency.

To enable a person injured by the malpractice of a medical or surgical practitioner to recover damages, it is not necessary that there should be privity of contract. This is pointed out by Garrow, B., in *Pippin v. Sheppard*,⁵ who instances the case "of surgeons retained by any of the public establishments,"⁶ for whose negligence the patients would be precluded from recovering damages if a retainer were necessary, and the action were founded otherwise than upon tort; "for it could hardly be expected that the governors of an infirmary should bring an action against the surgeon employed by them to attend the child of poor parents who may have suffered from their negligence and inattention."⁷

Privity of
contract not
necessary to
entitle to bring
action.

On the other hand, a father residing away from his family has been held liable for medical attendance where he did not know the surgeon had been called in, and though the accident that was treated was caused by the negligence of a servant.⁸

Father of
family held
liable for
medical attend-
ance given in
his absence.

¹ *Hibbard v. Thompson*, 109 Mass. 286.

² See *Ely v. William* (N. J.), reported as a note to *Holtzman v. Hoy*, 59 Am. R. 390, at 392.

³ *Hupe v. Phelps*, 2 Stark (N. P.) 480; *Ely v. Wilbur*, 60 Am. R. 668. A different view seems to have been taken in *Jonas v. King*, 81 Ala. 285, United States Digest, 1887, 518, where it was held that one sued for physician's services may show that they were of no value, and that the medicine prescribed was worthless. Cp. a lunacy case, *Pennell v. Cummings*, 75 Me. 163.

⁴ *Price (Ex.)* 400.

⁵ *Urquhart v. Grigor*, 3 Macph. 283.

⁶ *L. c.*, at 409. *Post*, 1424.

⁷ *Gladwell v. Steggall*, 5 Bing. N. C. 733; *Du Bois v. Decker*, 130 N. Y. 325, 27 Am. St. R. 529. Who pays is immaterial, the duty when undertaken being to use reasonable care and skill according to the ordinary standard: see per Parke, B., *Longmead v. Holliday*, 6 Ex. 761, at 767. *Ante*, 1366.

⁸ *Cooper v. Phillips*, 4 C. & P. 581.

In absence of contract, action depends on duty.

Where there is no contract the action depends upon duty; and where there is no duty the plaintiff cannot recover; as in *Pimm v. Roper*,¹ where the plaintiff sought to recover against the doctor of a railway company who examined the plaintiff on their behalf, and advised the plaintiff that his injuries were so slight he should take compensation; the plaintiff accepted compensation, but afterwards, finding his injuries proving more considerable than he was told they were, sued the doctor, but was held not entitled to recover.

Physician not liable for mistake in druggist in making up a prescription.

Stretton v. Holmes.

A Canadian case² must here be noted, where a physician wrote a prescription for the plaintiff, and directed it should be charged to himself by the druggist; which was done. The physician's fee, including the charge for making up the prescription, was paid by the plaintiff. In mistake, the druggist's clerk put prussic acid in the mixture, and the plaintiff in consequence suffered injury. The druggist was held liable, the physician was held not liable. Between the druggist and the dispenser the relation of master and servant existed, between the druggist and the physician the relation was that of employer and contractor. Besides this, it may be noted that the druggist was a skilled person, and there was no duty of examining his work incumbent on the physician.³

Rule applicable to a druggist.

The rule of liability applicable to a druggist is the same as that which governs the liability of those persons whose work requires special knowledge or skill. Such a person is not legally responsible for any unintentional injury resulting from a lawful act, unless the failure to exercise due and proper care can be imputed to him,⁴ and the burden of proving such lack of care, when the act is lawful, is on the plaintiff.

Liability of governing body of hospital for negligence of surgeon.

McDonald v. Massachusetts General Hospital.

The liability of the board of governors or committee of a hospital or dispensary to any patient treated there for injuries arising from the negligence of the surgeon or medical practitioner whom they have appointed as their medical officer has not directly been raised in any English case.⁵ The question has been exhaustively discussed in America. In *McDonald v. Massachusetts General Hospital*,⁶ the Supreme Court of Massachusetts held that where a hospital board had used due care in selecting a properly qualified medical officer, they were not liable for his negligences while acting as their officer. This case was decided, partially at any rate, on the authority of *Holliday v. St. Leon-*

¹ 2 F. & F. 783.

² *Stretton v. Holmes*, 19 Ont. R. 286.

³ *Cp. Thomas v. Winchester*, 6 N. Y. 397; and *George v. Skivington*, L. R. 5 Ex. 1; *ante* 51.

⁴ *Allen v. State Steamship Company*, P. 132 N. Y. 91, 28 Am. St. R. 556.

⁵ *Cp. ante*, 288.

⁶ 120 Mass. 432, 21 Am. R. 529.

ards, Shoreditch,¹ which, after the remarks of Blackburn, J., in *Foreman v. Mayor, &c.*, of Canterbury,² must be considered as overruled. In the subsequent case of *Glavin v. Rhode Island Hospital*,³ the same point again came up for decision, and the Rhode Island Court, eliminating the doubtful elements in the earlier case, made a searching investigation into the principles applicable, where the trustees of a public hospital are sued for unskilful surgical treatment of a patient in the hospital. The reasoning of the Chief Justice is as follows: "The physicians or surgeons are selected by the corporation or the trustees. But does it follow from this that they are the servants of the corporation? We think not. If A, out of charity, employs a physician to attend B, his sick neighbour, the physician does not become A's servant, and A, if he has been duly careful in selecting him, will not be answerable to B for his malpractice. The reason is that A does not undertake to treat B through the agency of the physician, but only to procure for B the services of the physician. . . . And so there is no such relation between the corporation and the physicians or surgeons who give their services at the hospital. It is true, the corporation has power to dismiss them; but it has this power, not because they are its servants, but because of its control of the hospital where their services are rendered. They would not recognise the right of the corporation while retaining them to direct them in their treatment of patients." This seems a satisfactory ground of decision, and similar considerations will doubtless determine when the question arises in England.

In New Zealand the point has been decided by the Court of Appeal as in *Glavin's* case, and on the authority of the reasoning therein.⁴

Negligence in the care of or in certifying alleged lunatics must here be noticed.⁵

The adjuration of Lord Mansfield, "God forbid, too, that a man should be punished for restraining the fury of a lunatic when that is the case,"⁶ has been referred to⁷ as the authority for the statement that, at common law, any man may justify an assault when it may restrain the fury of a lunatic and prevent mischief.⁸ Justifica-

¹ 11 C. B. N. S. 192.

² L. R. 6 Q. B. 214, at 218.

³ 34 Am. R. 675.

⁴ *District of Auckland Hospital and Charitable Aid Board v. Lovett*, 10 N. Z. L. R. 597 (C. A.)

⁵ The older law as to lunatics may be gathered from the report of *Beverley's Case*, 4 Co. Rep. 123 b; *Bac. Abr. Idiots and Lunaticks*; *Vin. Abr. Lunatick Non-Compos, and Ideot*; *Com. Abr. Idiot, Pleader* (3 M. 22); 1 *Spence. Eq. Jur.* 618. See *ante*, 54.

⁶ *Brookshaw v. Hopkins*, *Lofft* (K.B.) 240, at 243.

⁷ *Archbold, Lunacy* (3rd ed.), 351.

⁸ *Bro. Abr. Faux Imprisonment*, pl. 28.

Glavin v. Rhode Island Hospital.

Approved and followed by the Court of Appeal.

Negligence in the care of or in certifying lunatics.

tion for it may, however, be found much earlier—as early, indeed, as Y.B. 22 Edw. IV. 45 pl. 10.¹ But this protection was only allowed in the case of one “furiosus”; and where there was failure to prove that the alleged lunatic was actually insane at the time when he was interfered with, no justification was possible.² Yet, when it has been shewn that the lunatic was in such a state at the time he was restrained that he was likely to do mischief to any one, the restraining him is justified, and for so long in addition as is necessary to afford reasonable ground to believe that the danger is over, not merely for the moment of the original danger. It seems, from *Anderdon v. Burrows*,³ to be the law that if a physician were of opinion, from the relation of those interested, that a person should be confined as a lunatic in order to prevent his doing injury to himself or to others, he would be justified in taking measures to confine him, even though he himself did not visit the alleged lunatic.⁴ If, however, the alleged lunatic were not in fact insane, whatever the representations, the action would be undefended, and the nature of the statements made would only go in mitigation of damages.

Anderdon v. Burrows.

Common Law modified by statute.

The defects in the common law as to lunacy were sought to be redressed by 8 & 9 Vict. c. 100, and 16 & 17 Vict. c. 96. In *Fletcher v. Fletcher*,⁵ however, it is pointed out that, while sec. 99 of the earlier of these Acts protects duly authorized persons acting under certificates and an order for the confinement of a lunatic, no protection is given to the person who makes the order. His liability, therefore, continues as at common law.

Hall v. Sample.

The leading case against a medical man under these early statutes is *Hall v. Sample*.⁶ The declaration, as ultimately amended, charged that the defendant, being a physician, and without reasonable or probable cause, and with intent to cause the plaintiff to be imprisoned and put under bodily restraint, did as a physician sign a certain certificate according to the form prescribed by the Lunacy Acts, whereby it was certified among other things that the plaintiff was of unsound mind. The defendant pleaded “not guilty” under 16 and 17 Vict. c. 96.

Summing up of The law applicable to the case was exhaustively stated by Crompton, J.

¹ See *Fletcher v. Fletcher*, 1 E. & E. 420, where, on a plea alleging that the plaintiff conducted himself as if he were insane, Lord Campbell, C.J., says: “It would be most dangerous to the liberty of the subject if a man could be imprisoned under circumstances such as appear upon this plea. It would place in jeopardy the liberty of many persons of eccentric habits, though in perfect possession of their faculties. There must be actual insanity to justify confinement.”

² *Scott v. Wakem*, 3 F. & F. 328.

³ 4 C. & P. 210.

⁴ The remarks made in *Lister v. Perryman*, L. R. 4 H. L. 521, may afford indication of what inquiries and statements would justify a medical man in so acting.

⁵ 1 E. & E. 420.

⁶ 3 F. & F. 337.

Crompton, J., in his summing up. As originally framed the declaration alleged malice. This the learned judge ruled not to be necessary to give the right of action. The true ground of action was negligence and want of due care. "I think," said he,¹ "that if a person assumes the duty of a medical man under this statute and signs a certificate of insanity which is untrue, without making the proper examination or inquiries which the circumstances of the case would require from a medical man using proper care and skill in such matter, if he states that which is untrue, and damage ensues to the party thereby, he is liable to an action." Turning to the question of the degree of care that must be observed, the learned judge said:² "One can hardly say precisely what that degree of care may be. It could not be said, perhaps, that the medical man is bound to examine every person connected with the party. The matter is for you" (the jury). "You are acquainted with the ordinary exigencies of life; you must judge as men of the world by the light of your own common sense." "We may take it, however, as clear, that considerable care ought to be used; and the question for you is whether the proper degree of care was used, or whether there was that culpable negligence which has been imputed to the defendant. It is not a mere mistake or error in judgment which would amount to such negligence, but you must be satisfied that there was culpable negligence."³ And again: "You are not inquiring into an error of judgment, but whether the defendant has been guilty of that culpable negligence which I have explained and described to you; negligence is not making sufficient inquiries, the examination not having been sufficient in his own judgment. It would be dreadful if a medical man were to suffer merely from an error of judgment. The question is, whether there has been a neglect of that duty which a person in a case of this kind owes, not to interfere in a matter which touches the liberty of his fellow-citizen without taking due care and making a careful examination and inquiry."⁴

The rights and duties of medical men and others in certifying Lunacy Act, and taking care of lunatics are now regulated and determined by ^{1890.} the Lunacy Act, 1890.⁵ By section 330 the most adequate protection is afforded those acting in good faith in proceedings for the security of lunatics. Any person who presents a petition for

¹ *L. c.*, at 354.

² *L. c.*, at 356.

³ *L. c.*, at 357.

⁴ *L. c.*, at 365. As to the examination required under the Lunatic Asylums Act 1853 (16 & 17 Vict. c. 97) s. 68, see *The Queen v. Whitfield*, 15 Q. B. D. 122. See now the Lunacy Act, 1890 (53 Vict. c. 5), and the Lunacy Act, 1891 (54 & 55 Vict. c. 65).

⁵ 53 Vict. c. 5.

a reception order,¹ "or signs or carries out or does any act with a view to sign or carry out an order purporting to be a reception order or any report or certificate under this Act, or does anything in pursuance of this Act," is not to be liable to any civil or criminal proceedings, whether on the ground of want of jurisdiction or on any other ground, if he acts "in good faith and with reasonable care."²

Thomson v.
Schmidt.

In *Thompson v. Schmidt*³ an effort was made to render a medical man liable for setting in motion a relieving officer who, acting under section 20, caused an alleged lunatic to be taken and confined in a workhouse. The defendant, who had been medical adviser to the plaintiff's family, had on the application of plaintiff's wife, given a note to the relieving officer in these terms: "I hereby certify that Mr. Thompson is a person of unsound mind and is dangerous to those about him." At the trial the judge held that the defendant's intervention was a proceeding under the Act. The jury found a verdict for the plaintiff. This was set aside by the Court of Appeal on two grounds: first, that there was no negligence, because there was no duty; secondly, that the act by which the plaintiff suffered was the act of the relieving officer in the exercise of his discretion.

Judgment of
Lord Esher,
M.R.

As to the former of these grounds Lord Esher, M.R., said: "A man could not be sued for negligence unless there was a duty imposed on him to take care. A medical man held himself out to any one employing him for treatment as a medical man as a person who would act with ordinary care and skill. To others a medical man had no duty to be careful or skilful. His duty was to his patients." The distinction indicated is that the fact that a man whose duty towards his neighbour is regulated by the ordinary rules requiring unskilled diligence, happens also to be a medical man, does not impose on him a greater obligation than in the ordinary case of an unskilled person. His duty is to bring ordinary care to bear, not professional skill.

Dr. Wharton's
statement
adopted by the
Court.

As to the second point, though the report does not so state, the Court adopted a passage from Wharton⁴ which Lord Esher M.R., read as follows: "Supposing that if it had not been for the intervention of a responsible third party the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be

¹ See definition in sec. 341; also Part I. ss. 4 to 38.

² The form of medical certificate is carefully provided for, sec. 28, and Sch. ii. Form 8, of the Lunacy Act, 1890 (53 Vict. c. 5). Form 9 is an additional paragraph to be incorporated in Form 8, where an "urgency order" is asked for; as to which, see sec. 11.

³ 8 Times L. R. 120 (C. A.).

⁴ Negligence (2nd ed.), § 134. The same passage is textually set out and adopted, *Howard v. Corporation of St. Thomas*, 19 Ont. R. 719.

answered in the negative, for the general reason that casual connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent on a particular subject matter as to which I am not contractually bound. Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening . . . is the one who is liable to the person injured. I may be liable to him for my negligence in getting him into difficulty, but I am not liable to others for the negligence which he alone was the cause of making operative." "The sole responsibility," said Lord Esher, M.R., "was upon the relieving officer, and he had to act upon his own responsibility. That being so, the opinion of the defendant was not the cause of the plaintiff's being taken to the infirmary. The act of the relieving officer was the cause. Even though it might possibly be true that the act of the defendant was the *causa sine qua non*, it was not the *causa causans*. In other words, the confinement was not the direct result of the defendant's act, but it was the direct result and the sole result of the act of the relieving officer. There was the intervention of an independent and responsible third person—namely, the relieving officer, who was responsible for what was complained of." It was not seriously contended that the "certificate" was a certificate under the Act.

Responsibility
on the
relieving
officer.

The duty of certain public officers named in the Lunacy Act, 1890,¹ differs according as the lunatic is (1) dangerous, so that it is necessary "for the public safety or the welfare" of the alleged lunatic to place such alleged lunatic under care and control,² or is (2) a pauper,³ or is (3) not a pauper and not under proper care and control.⁴ In the first case the duty of the constable, relieving officer, or overseer, is *quasi* judicial; he has to exercise a discretion. In the second case the duty imposed is only on the relieving officer and overseer, omitting the constable. The duty is absolute; within three days of obtaining knowledge of a pauper lunatic within his district he is to give notice to a justice. Failure in this duty renders him liable to a penalty not exceeding £10 a day "for each day or part of a day during which the default continues."⁵ In the third case the duty of the constable, relieving officer, or overseer is, within three days of obtaining

Duty of public
officers under
the Lunacy
Act, 1890.

¹ 53 Vict. c. 5. *Ante*, 288.

² Sec. 20.

³ Sec. 14. The duty being a statutory one, enforceable by penalties under sec. 320, there does not appear to be any personal duty to the lunatic or his relatives, other than not to be negligent in dealing with him.

⁴ Sec. 13.

⁵ Sec. 320.

knowledge of facts, to "give information thereof on oath."¹ Here again the officer has apparently to exercise a discretion.

In view of the liability to action in these cases the protection given² to one who does "anything in pursuance of this Act" is important, since any person so acting "shall not be liable to any civil or criminal proceedings, whether on the ground of want of jurisdiction or on any other ground if such person has acted in good faith and with reasonable care." To found an action facts pointing to want of good faith and absence of reasonable care seem necessary. Where proceedings are commenced they may, "upon summary application to the High Court or a Judge thereof, be stayed upon such terms as to costs and otherwise as the Court or Judge may think fit, if the Court or Judge is satisfied that there is no reasonable grounds for alleging want of good faith or reasonable care."³

The analogy indicated seems to be to actions of false imprisonment and malicious prosecution. In considering the duty of the officer to ascertain the condition of the alleged lunatic it does not appear that there is any absolute obligation on him to make personal inquiries; if the officer can shew he has acted on the information of a trustworthy informant his duty is discharged.⁴

A person giving notice to a relieving officer under the 14th section does not seem to be under any further duty than an ordinary citizen is under in communicating to a neighbour information of a neighbour.

Prohibition on
sale of poisons.

We may in addition note that the selling of certain poisons (including all compounds⁵ containing more than an infinitesimal amount⁶ of such poisons) is prohibited to all persons unless registered by virtue of the 31 & 32 Vict. c. 121, the object of which "is, *beyond all other considerations*, to provide for the *safety of the public*;"⁷ and the sale of poisons is regulated by ss. 15-17 of that act, and by the 32 & 33 Vict. c. 117, s. 3. The prohibition extends to all proprietary medicines containing such poisons, but not to medicines made under letters patent.⁸

Veterinary
surgeon.

The rule of diligence for a veterinary surgeon is laid down in *Barney v. Pinkham*⁹ to be in accordance with the ordinary rule of *spondet peritiam artis*.¹⁰

¹ Sec. 13.

² Sec. 330.

³ The section is considered in *Williams v. Beaumont*, 10 Times L. R. 543 (C. A.).

⁴ *Lister v. Perryman*, L. R. 4 H. L. 521.

⁵ *Pharmaceutical Society v. Armon* (1894), 2 Q. B. 720, approving *Pharmaceutical Society v. Piper* (1893), 1 Q. B. 686.

⁶ *Pharmaceutical Society v. Delves* (1894), 1 Q. B. 71.

⁷ Per Hawkins, J., *Pharmaceutical Society v. Wheeldon*, 24 Q. B. D. 683, at 688, where the unregistered assistant of a chemist duly registered was held liable to a penalty under sec. 15.

⁸ *Pharmaceutical Society v. Armon* (1894), 2 Q. B. 720.

⁹ 26 Am. St. R. 389. The law on this is to be found in Oliphant, *Law of Horses* (4th ed.), 228.

¹⁰ *Ante*, 974 and 987.

CHAPTER III.

SOLICITORS.

SOLICITORS, or, as they used to be called, Attorneys, hold the Introductory. position both of public officers and of skilled persons, discharging duties under contracts. The consideration of their relations might therefore without impropriety have been undertaken in connection with public officers. Yet as the public functions of solicitors are, after all, only accessory to their private employments, and as their duties present more numerous points of similarity with those of architects and medical men than with those of sheriffs or officers of public bodies, it is more convenient to treat them under the heading of private persons mainly concerned with the performance of duties requiring trained and professional skill.

The term solicitor of the Supreme Court in England now Three classes included under term solicitor. includes¹ three distinct classes of persons :

(a) Attorneys at law, who practised before the Courts of Common Law, and at one time had a privilege to be sued in these Courts, reference to which is still preserved in the County Courts Act, 1888.²

(b) Solicitors of the Court of Chancery.³

¹ Judicature Act 1873, s. 87 (36 & 37 Vict. c. 66).

² 51 & 52 Vict. c. 43, s. 175. See *Borradaile v. Nelson*, 14 C. B. 655, at 657-660. The learning on the privilege of attorneys is to be found *Bac. Abr. Privilege (B)*, The particular Privileges in Suits allowed Officers and Attendants in the Courts of Justice. See *Com. Dig. Attorney*, and *Bac. Abr. Attorney*, for the historical law; also *Termes de la Ley, Attorney*.

³ Pulling, *Law relating to Attorneys* (3rd ed.), 9. Pulling, *Order of the Coif*, 117-122. The general statutes relating to solicitors are 6 & 7 Vict. c. 73; 23 & 24 Vict. c. 127; 37 & 38 Vict. c. 68; 40 & 41 Vict. c. 25. The distinction originally existing between attorneys and solicitors may be traced to the circumstances of the origin of chancery jurisdiction. Attorneys attending the King's Courts were under the surveillance of the justices so early as the year 1402, see 4 Hen. IV. c. 18. The first statutory mention we have of solicitors is more than two hundred years later, in the Act of 3 Jac. 1, c. 7. The ordinary jurisdiction of the Chancellor is of a date subsequent to the reign of Henry IV. (*Dugdale Origines Juridicales*, 2nd ed. 37), and not being invoked by writ, but by petition or bill (1 Spence. *Eq. Jur.* 367), and being of grace, not of right, those who set matters in motion seem to have been in the position of people at the present day petitioning any high officer of state. From applying to the Chancellor in one matter or for themselves, some came to offer to undertake generally for any one

(c) Proctors,¹ who practised before the Court in which the Civil and Common Law were administered, as in the Courts of Admiralty and the Ecclesiastical Courts.

Definition of attorney.

An attorney² is either public or private. The former is usually termed an *attorney-at-law*, and is a person who may be employed generally by any person to prosecute and defend actions in courts of law; the latter is a person appointed for a particular purpose, which is usually done by an instrument in writing called a letter of attorney, in which is expressed the particular act or acts for which he is appointed.³ With the latter we have here no concern.

An attorney-at-law, says Blackstone,⁴ answers to the *procurator* or *proctor* of the civilians and canonists—using these words as if co-extensive and synonymous. There appear, however, to have been two kinds, covered by this wide expression, the *pragmatici* and the *procuratores*.

Pragmatici.

The *pragmatici* are described as persons who assisted the advocates when they were pleading, and instructed them in points of law.⁵

wishing to invoke the Chancellor's intervention, and quickly became recognised as a class, and not a particularly well-reputed one (see the definition of solicitor in Cowell, Interpreter), called solicitors. The abuses arising from their unregulated exertions probably occasioned the passing of the Act 3 Jac. 1, c. 7; from the time of the passing of which Act solicitors are associated with attorneys.

¹ Burn. Ecc. Law. *sub voc.* Proctor; Domat, Public Law, Bk. 2 tit. 5, s. 2, where the definition is given: "Proctors are officers established to represent in judgment the parties who empower them to appear for them, to explain their rights, to manage and instruct their cause, and to demand judgment." See Pothier, *Traité du Contrat de Mandat, Des mandat qui ont pour objet quelque affaire judiciaire et des procureurs ad lites*, Nos. 124-143.

² "Attorney," says Sir E. Coke, Co. Litt. 51 b, "is an ancient English word, and signifieth one that is set in the turn, stead, or place of another." See Fitzh. De Nat. Brev. 156 D; Combes's Case, 9 Co. Rep. 75. For a very readable account of the duties of Attorneys and Solicitors, see Samuel Warren's book with that title, in which is the following, at 194: "I recollect a case where a client of mine had his declaration on a bill of exchange demurred to, because, instead of the words 'in the year of our Lord, 1834,' he had written 'A.D. 1834'; I attended the late Mr. Justice Littledale, at chambers, to endeavour to get the demurrer set aside as frivolous, or leave to amend on payment of a shilling; but that punctilious, though very able and learned, judge refused to do either. 'Your client, sir,' said he, has committed a blunder, sir, which can be set right only on the usual terms, sir. 'A.D.," sir, is neither English nor Latin, sir. It may mean anything or nothing, sir. It is plain, sir, that here is a material and traversable fact, and no date to it, sir;' and so forth; whereupon he dismissed our poor summons with costs. That demurrer had been spun out, by a pleader, to an inconceivable length, in ringing the changes on that one objection, and my client had positively to pay out of his own pocket between seven and eight pounds." Cp. Birdos v. Spittle, 1 Ex. 175.

³ Jacob, Law Dictionary, Attorney.

⁴ 3 Bl. Comm. 25; Jacob, Law Dictionary, Attornies at Law.

⁵ *Itaque ut apud Græcos infirmi homines mercedula adducti ministros se præbent in judiciis oratoribus, ii qui apud illos παραγματολόγοι vocantur* (Cic. De Orat. 1, 45). And again: *Illi disertissimi homines ministros habent in causis juris peritos, (cum ipsi sint imperitissimi) et qui, ut abs te, paulo ante dictum est, pragmatici vocantur. In quo nostri omnino melius multo, quod clarissimorum hominum auctoritate leges et iura tecta esse voluerunt. Sed tamen non fugisset hoc Græcos homines, si ita necesse esse arbitrati essent, oratorem ipsum erudire in jure civili non ei pragmaticum adjutorem dare* (Cic. De Orat. 1, 59).

The *procuratores* seem to have resembled attorneys amongst us.¹ In the French Roman Law, *procurator* was the *nomen generalissimum*, answering to attorney in English law; while what Cicero calls *pragmatici* were designated *proctors*²—that is, attorneys-at-law with us. The analogy by Blackstone is therefore incomplete in likening attorneys-at-law to the *procuratores* of the ancients; since *procurator* is a much wider term, and corresponds with the English term attorney; and that description with which we are now to concern ourselves—attorneys-at-law—is but a species of the larger class attorney, and answers to the *proctor* of Domat and the *pragmaticus* of Cicero.³

The purpose of the delegation of duties to these officers is said to have been “to remove from tribunals the liberty which parties had to vent their passions, their anger, and to commit irreverences and other abuses, which are consequences of the want of the respect that is due to judges.”⁴

Their chief duty is to look upon themselves as having espoused the interest of their clients in order to defend them, “as if they themselves were the parties concerned, but free from their passions, and capable of demanding justice with that respect and decency that is due to the tribunal.”⁵ It follows that they should rather abandon the defence of their clients than aid them in unlawful conduct.⁶

Solicitors as officers of the Supreme Court are amenable to the jurisdiction of the Court.⁷ Thus the solicitor is not the mere

Purpose of the delegation of duties to these officers.

Duties.

Solicitors officers of the Supreme Court of Justice.

¹ *Legitimè procurator dicitur omnium rerum ejus, qui in Italia non sit absque republice cause, quasi quidam pene dominus, hoc est, alieni juris vicarius* (Cic. pro Cæcin. 20). Again: *Nihil videbatur esse in quo tantulum interesset, utrum per procuratores ageres, an per ipsum; ut abis toties, et tam longe abes* (Cic. ad Attic. 4, 16). See Smith, Dictionary of Greek and Roman Antiquities (3rd. ed.), “*Procurator*” and “*Actio*.”

² Domat, Public Law, Bk. ii. tit. 5, s. 2.

³ Cp. Tomlin, Law Dictionary, *sub voc.* Proctor, Procurator.

⁴ Domat, Public Law, Bk. ii. tit. 5, s. 2, art. 2.

⁵ *Ibid.* s. 3. Cp. The Queen v. Cox & Bailton, 14 Q. B. D. 153.

⁶ 36 & 37 Vict. c. 66, s. 87. *In re Freston*, 11 Q. B. D. 545; approved *In re Dudley*, 12 Q. B. D. 44; and followed *In re H. A. Grey* (1892), 2 Q. B. 440. In *Ex parte Secombe*, 19 How. (U. S.) 9, at 13, Taney, C.J., says: “It has been well settled, by the rules and practice of Common Law Courts, that it rests exclusively with the Court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed. The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the Court, or from passion, prejudice, or personal hostility; but it is the duty of the Court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the Court, as the rights and dignity of the Court itself.” See as to the formalities necessary to be observed in proceedings against attorneys for malpractice or unprofessional conduct, *Randall v. Brigham*, 7 Wall. (U. S.) 523, an action against a judge for removing an attorney-at-law from the bar for malpractice and misconduct in his office. See also *Bradley v. Fisher*, 13 Wall. (U. S.) 335, where a threat of personal chastisement made by an attorney to a judge out of Court for his conduct during a pending trial was held good cause for striking his name off the list of attorneys practising in the Court. See the case of Daniel Wood, reported as a note to *Seymour v. Ellison*, 2 Cowen (N. Y.) 29.

agent of his client, but a responsible officer who may be made liable for disregarding the rights and interests of others.¹

Summary jurisdiction exercised over solicitors by the Court.

The Courts have always exercised a summary jurisdiction over solicitors as officers of the Court in cases of gross neglect, ignorance, or misbehaviour in the conduct of the client's business, whereby the client has sustained a loss, or the solicitor has not complied with well-known rules and practices of the Court, or has acted extortionately or vexatiously² as solicitor;³ for where a solicitor is employed in a matter wholly unconnected with his professional character the Court will not interfere in a summary way to compel him to execute faithfully the trust reposed in him; but where the employment is so connected with his professional character as to afford a presumption that his character formed the ground of his employment, the Court will exercise jurisdiction.⁴

No duty on client to ascertain solicitor's qualifications.

Where a person professes to be a solicitor, and to practise as such, a client employing him is not bound to ascertain whether he is duly qualified;⁵ hence proceedings taken by persons so acting are not ineffectual so far as they are taken on behalf of the client.⁶

Delegation of powers.

A solicitor may not delegate his powers, since they involve trust or discretion;⁷ though he may do those acts which are done in the ordinary course of business by others through his servants or partners;⁸ and for negligent or improper performance of these he is liable either to an action or to the summary process of the Court.⁹ This liability does not extend to liability for auxiliary

¹ *Ezart v. Lister*, 5 Beav. 585.

² *Merrifield, Law of Attornies*, 77.

³ *De Woolfe v. —*, 2 Chit. (K. B.) 68; *In re G. Chitty*, 2 Dowl. Prac. Cas. 421.

⁴ *In the Matter of Aitkin*, 4 B. & Ald. 47. As to the duties of solicitors as officers of the Court, see *Merrifield, Law of Attornies*, 77; *Cordery, Law of Solicitors* (2nd ed.), 135. It is not necessary that the matter should arise in an action: *Re Cretwell and Fosbroke*, 1 Jur. 755; the Courts will not interfere summarily where the matter is as to the discounting of bills: *Ex parte Schwalbanker*, 1 Dowl. Prac. Cas. 182; but see *In re Knight*, 1 Bing. 91. To found this jurisdiction it is requisite that some part of the business must be done in the court to which the client applies: *Re Lord Cardross*, 5 M. & W. 545.

⁵ *Hilleary v. Hungate*, 3 Dowl. Prac. Cas. 56.

⁶ *Smith v. Wilson*, 1 Dowl. Prac. Cas. 545; *Hilleary v. Hungate*, 3 Dowl. Prac. Cas. 56; *Glynn v. Hutchinson*, 3 Dowl. Prac. Cas. 529; *Harding v. Purkiss*, 2 Marsh. (C. P.) 228. To this last case there is a note. In *Hopwood v. Adams*, 5 Burr. 2660, the Court of King's Bench set aside a judgment which had been entered up by an attorney's clerk, using the name of a regular attorney, without the knowledge or consent of the latter. It is not stated whether the plaintiff were privy to, or ignorant of, the informality.

⁷ *Hemming v. Hale*, 7 C. B. N. S. 487, per Williams, J., at 498. *Ante*, 986, and 1376 n^o.

⁸ *Ex parte Sutton*, 2 Cox (Eq. Cas.) 84, where it was held that an authority given to A. to draw bills in the name of B. may be exercised by the clerks of A.; *Rossiter v. Trafalgar Life Assurance Association*, 27 Beav. 377.

⁹ *Floyd v. Nangle*, 3 Atk. 568; *Collins v. Griffin*, Barnes, Notes of Cases in Points of Practice, 37; *Re Ward*, *Simmons v. Rose*, 31 Beav. 1. As to partners, each individual member of the partnership is *prima facie* liable and responsible for any misconduct, *Norton v. Cooper*, 3 Sm. & G. 375. See *Blyth v. Fladgate* (1891), 1 Ch. 337.

agents or experts employed by him when they are charged with a special discretion of their own.¹ In matters which have to be entrusted to such agents, the necessity of their employment should be communicated to the client; when this is done, the solicitor is only liable for *culpa in eligendo*, unless he is jointly negligent with the agent he has chosen. Where the client has been consulted, and has intelligently approved the appointment of the particular agent, even this liability is removed. If the solicitor has the sole duty of selecting the agent, he must exercise adequate diligence and skill, or, failing to do so, must answer for his fault.²

On grounds of public policy it has been held that those bound to advise, and who ought, therefore, to give sound and sufficient advice, are not to be allowed to take advantage of their own ignorance; so that where, through the ignorance of an attorney, or through his neglect, property descended upon him that otherwise would have been willed to other persons, he was not allowed to take any benefit from it, and was held to be a trustee for the benefit of those entitled had he done his duty.³ It is scarcely necessary to say that an erroneous answer to a mere casual inquiry to one not a client is not actionable.⁴ It is not the fact that the man giving advice to another is a lawyer that affects him with liability if the advice is wrong or foolish; there must in addition be the existence of a duty to advise skilfully; so that where there is no duty there is no liability; and where the duty is only that of a non-professional person the accident that the person discharging it is a professional person will not operate to increase his obligation.⁵

May not take advantage of their own ignorance.

Liability arises from contract.

Robertson v. Fleming,⁶ indicates with considerable distinctness the rules applicable in determining the liability of a solicitor. An action was brought by the respondents against the appellant, a law agent, alleging that through his negligence they lost money, for which they were induced to become sureties for a third party, who to secure them agreed to give them security over property he had. The appellant was employed by the third party in the preparation of this document; through his negligence the security was not completed; the third party became bankrupt, and the respondents had to pay up the money. The defence was a denial of the employ-

Robertson v. Fleming.

¹ *Watson v. Muirhead*, 57 Pa. St. 161. This is on the question of the liability of a conveyancer for negligence, in whose case the principle is "the rule of liability for errors of judgment as applied to them ought to be the same as in the case of gentlemen in the practice of law or medicine."

² *Wharton, Agency*, § 601.

³ *Bulkley v. Wilford*, 2 Cl. & F. 102.

⁴ *Fish v. Kelley*, 17 O. B. N. S. 194; *Pauley v. Freeman*, 2 Sm. L. C. (9th ed.), 74.

⁵ *Ante*, 1410.

⁶ 4 Macq. (H. L. Sc.), 167.

Opinion of
Lord Wensley-
dale;

of the Lord
Chancellor.

Tully v.
Ingram.

Judgment of
Lord M'Laren.

ment by the sureties, or that any duty was owing to them from the appellants. A verdict was given for the sureties, and after several abortive proceedings, with a view to set it aside, the case came before the House of Lords on what was in substance the question whether in the absence of privity of contract there could be liability. The conclusion of the House of Lords is thus tersely put by Lord Wensleydale:¹ "He only, who by himself, or another as his agent, employs the attorney to do the particular act in which the alleged neglect has taken place, can sue him for that neglect, and that employment must be affirmed in the declaration in the suit in distinct terms." "It is impossible to support by a single case so extraordinary a proposition as that persons, who were not, by themselves or their agents, employers of law agents to do an act, could have a remedy against them for the negligent performance of it." "I never had any doubt," says the Lord Chancellor,² "of the unsoundness of the doctrine" "that A., employing B., a professional lawyer, to do any act for the benefit of C., A. having to pay B., and there being no intercourse of any sort between B. and C., if, through the gross negligence or ignorance of B. in transacting the business, C. loses the benefit intended for him by A., C. may maintain an action against B. and recover damages for the loss sustained. If this were law, a disappointed legatee might sue the solicitor employed by a testator to make a will in favour of a stranger, whom the solicitor never saw or before heard of, if the will were void for not being properly signed and attested." It was also pointed out that the authority³ most relied on to sustain a liability apart from contract, was in fact (and apart from an erroneous head-note) no authority at all in the matter; the simple proposition laid down being that, where a professional person is *de facto* agent for both lender and borrower, and is guilty of negligence, he is not liable merely to him who pays him, but to the other person for whom he acts as well.⁴

This decision was acted on in Tully v. Ingram;⁵ the rule laid down therein was thus formulated by Lord M'Laren:⁶ "that in order that a person taking a benefit should have a right of action founded on professional negligence he must be able to shew that the agent was employed by him or with his authority." Lord M'Laren continues: "When two persons are entering into a commercial agreement or an agreement by which some benefit is exchanged

¹ L. c., at 199 and 200.

² Lord Campbell, L. c., at 177. *Ante*, 68.

³ Lang v. Struthers, 2 Wils. & Shaw (H. L. Sc.), 563.

⁴ 4 Macq. (H. L. Sc.) 167, per Lord Cranworth, 194. *In re The Ipatone Park Colliery Company, Brough's Claim*, 18 W. R. 285.

⁵ 19 Rettle 65.

⁶ L. c., at 76.

against another, then the ordinary course of business is that the agent of one party draws the deed and the agent of the other revises it, so that each person should have the benefit of professional assistance directed towards his own interest exclusively. But, on the contrary, if a person is going to make a gift to a relative or friend, it is not in accordance with the ordinary practice, nor would it occur to one as a natural and reasonable measure, that there should be two agents employed, or that any one should act at all as professional adviser of the recipient of the benefit. In such a case the person making the gift employs his own agent to make his will, and never thinks of communicating with or intimating his intention to his legatees. If a father makes a settlement on his daughter in the event of her marriage, supposing that it is not to be put into her contract with her husband, but to benefit the daughter, her father would never think of asking her to name an agent in the preparation of a deed. Or supposing the father to give instructions to an agent, would the agent ever imagine that he had a claim against the daughter because the father had told her of his intentions."

I. As to the Court's dealings with a solicitor as its officer.

I. Court's dealings with a solicitor as its officer.

The Court will enforce by its summary jurisdiction all undertakings by a solicitor given in his character of solicitor¹—as, for example, an undertaking to enter an appearance,² or to pay a debt and costs;³ and will regulate its proceedings by considerations of good faith, and not of contract merely, since its interference is with the view of securing honesty in its officers, and not for the purpose of expediting the means of redress for breach of contract or of duty.⁴ If the solicitor is a party to the cause, the Court will not exercise the summary jurisdiction merely on the ground that he is the officer of the Court.⁵ Further, Pearson, J., in one case held that the Court has summary jurisdiction to make a solicitor liable for not properly discharging his duty by neglecting to leave an order for the payment of purchase-money at the paymaster's office, with a request to make the investment.⁶ Cotton, L.J., in a subsequent case doubted this as a general proposition, and pointed out that the solicitor against whom the charge was made, was there acting for other persons, and declined to express any opinion as to the general rule of jurisdiction.⁷

¹ *In re F. C.*, W. N. 1888, 77.

² *Lorrimer v. Hollister*, 2 Str. 693. R. S. C. 1883, Order xii. r. 18.

³ *In re Woodfin*, 51 L. J. Ch. 427. ⁴ *In re Hilliard*, 14 L. J. Q. B. 225.

⁵ *Northfield v. Orton*, 1 Dowl. Prac. Cas. 415.

⁶ *Batten v. Wedgwood Coal and Iron Company*, 31 Ch. D. 346.

⁷ *McDougall v. Knight*, W. N. 1887, 68.

The cases were subsequently fully discussed by Stirling, J., who was of opinion that the current of opinion was clear and decisive as to the liability of solicitors for misfeasance; and after giving every weight to Cotton, L.J.'s, doubt expressed in *MacDougall v. Knight*, the learned judge held that solicitors are liable, who, knowing the true title of a fund, take an active part in getting it dealt with in opposition to that title;¹ and in the case before him he made an order enforcing in a summary way the liability so declared to exist.

Court will
interfere in
case of fraud,

The Court will interfere summarily where a transaction in which a solicitor is involved in his character as solicitor, is tainted with fraud;² or where the solicitor has been expressly paid beforehand for what he has omitted to do.³

but not in
case of
blunder,

Unless something in the nature of fraud is shewn, the Court will leave the client to his remedy by action;⁴ and in *Clark v. Girdwood*,⁵ the Court of Appeal held that it had no jurisdiction to do otherwise where the solicitor's conduct was merely a blunder. "The Court," said James, L.J.,⁶ "has jurisdiction in cases of fraud, and where a person, against whom no relief could otherwise be asked is made a party to a suit on the ground of fraud, it is because the Court has jurisdiction to indemnify the person injured at the expense of all persons, whether solicitors or not, who have been active participators in the fraud, and it can, therefore, make any party to the fraud pay the costs of the proceedings which have been rendered necessary by the fraud in which he has taken part. But the Court has no jurisdiction to order a solicitor to pay the costs of a suit because it has been rendered necessary by his having made a blunder." There are a number of early cases inconsistent with this decision, and consequently overruled by it.⁷

¹ *In re Dangar's Trusts*, 41 Ch. D. 178, at 196.

² *In re William Jones*, 1 Chit. (K. B.) 651, in the case cited, which was one of "mere negligence," the Court refused to interfere. "Had fraud been imputed," said Best, J., "it might be the foundation of this proceeding." In *In re Hill*, L. R. 3 Q. B. 543, the attorney was suspended for twelve months. *In re Blake*, 3 E. & E. 34, asserts the jurisdiction of the Court "in all cases of gross misconduct." Cp. *In re Sparks*, 17 C. B. N. S. 727. *In re a Solicitor*, 25 Q. B. D. 17, decided that under the Solicitors Act, 1888 (51 & 52 Vict. c. 65), s. 13, the right to apply to the Committee of the Council of the Incorporated Law Society in respect of the misconduct of a solicitor is not confined to persons injured by such misconduct, but may be exercised by any person who alleges that it has taken place.

³ *Garner v. Lanson*, 1 Barn. (K. B.), 101; *Bex v. Tew*, Sayer (K. B.) 50.

⁴ *Barker v. Butler*, 2 Wm. Bl. 780; *Frankland v. Lucas*, 4 Sim. 586, where it was held that the Court had no jurisdiction to make a solicitor liable in its disciplinary capacity for mere negligence in the conduct of a suit. See *In re Dangar's Trusts*, 41 Ch. D. 178, 190, 191; *In re G. Mayor Cooke*, 5 Times L. R. 407; *Re Ward, Simmons v. Rose*, 31 Beav. 1, where a country solicitor was held liable for representations by his London agent.

⁵ *Fawkes v. Pratt*, 1 P. Wms. 593; *Ex parte Bennett*, 2 Mont. & A. 306; *White v. Hillacre*, 3 Y. & C. (Ex.) 278; *Courtney v. Stock*, 2 Dr. and War. (Ir. Ch.) 251; *Ridley v. Tiplady*, 20 Beav. 44; *Birch v. Williams*, 24 W. R. 700.

⁶ 7 Ch. Div. 9.

⁷ L. c. at 23.

The summary jurisdiction is most frequently exercised where solicitors are conducting proceedings in Court, and have been proved guilty of misconduct in the matter before the Court. In other matters the procedure is most usually by petition to suspend or otherwise deal with the solicitor for misconduct.¹ Where a solicitor is guilty of negligence or misconduct in a matter before the Court, the Court may, in the exercise of a summary jurisdiction, order him to pay the costs occasioned by his negligence or other misconduct;² and even where the Court has not noticed the matter the Taxing-master may disallow costs caused by the solicitor's negligence. Where the whole action has failed by reason of negligence, the Master cannot entertain the matter, which must be the subject of independent proceedings.³

Misconduct in the conduct of proceedings the most frequent ground of the Court's exercise of jurisdiction.

Though the Court will interfere summarily, in gross cases of neglect or misconduct, to visit solicitors with the costs of their negligence,⁴ it will not interfere summarily to compel compensation; that must be the subject of action.⁵ The Court will also act summarily where an action is really a solicitor's action—where the plaintiff is a mere puppet, and the real party suing is the solicitor. In such a case the Court holds the solicitor liable for all the expenses to which he has put the other parties by his conduct.⁶ Where a solicitor is personally ordered to pay costs as an officer of the Court, on the ground of negligence or misconduct, there is no need of leave to appeal, since the liability is contingent on negligence or misconduct being established.⁷

Case of solicitor's action.

The Court will also summarily, on petition, and without requiring a separate action to be brought, order a solicitor to replace trust funds lost through his negligence; even though the petitioner sustaining the loss was never in a contractual relation with him. "There is no doubt," said Lord Langdale,⁸ "of the principle, that if a solicitor, knowing that money which is in Court belongs to one person, presents a petition in the name of another, and

Solicitor ordered to replace trust funds.

Principle stated by Lord Langdale, M.R., in *Ezart v. Lister*,

¹ *In re Gregg*, L. R. 9 Eq. 137. See the Solicitors Act, 1888 (51 & 52 Vict. c. 65), ss. 12-15.

² R. S. C. 1883, Order lxx. rr. 11, 5, Order liv. r. 7; *De Rouigny v. Peale*, 3 Taunt. 484; *Upton v. Brown*, 20 Ch. D. 731 (unreasonable references to the judge); *Ladywell Company v. Huggons*, W. N. 1885, 55 (premature proceedings); *Martinson v. Clowes*, 33 W. R. 555.

³ *In re Massey and Carey*, 26 Ch. D. 459.

⁴ *In re William Jones*, 1 Chit. (K. B.) 651, where there is a note of a case before Lord Hardwicke, *Floyd v. Nangle*, 3 Atk. 568.

⁵ *Dixon v. Wilkinson*, 4 Drew. 614, 4 De G. & J. 508. See *British Mutual Investment Company v. Cobbold*, L. R. 19 Eq. 627, at 630. Compare *Lydney and Wiggpool Iron Ore Company v. Bird*, 33 Ch. Div. 85, at 96.

⁶ *In re Jones*, L. R. 6 Ch. 497. Cp. *In re E. S.* (a supposed lunatic), where no costs were given, 4 Ch. D. 301; *Cockle v. Whiting*, 1 Russ. & My. 43; as to the non-liability of a stranger to the record for costs of suit in the absence of malice, *Ram Coomar Coondoo v. Chunder Canto Mookerjee*, 2 App. Cas. 186.

⁷ *In re Bradford*, 15 Q. B. D. 635; *In re Hardwick*, 12 Q. B. D. 148.

⁸ *Ezart v. Lister*, 5 Beav. 585, at 587.

And by
Turner, L.J.,
in *Dixon v.*
Wilkinson.

obtains payment, he is personally chargeable with the amount. I go further, if he has not the knowledge of the fact, but has knowledge of circumstances which, if duly considered, would lead to a knowledge of the fact, he must be made personally answerable for that loss which his want of due consideration has occasioned." The rule was also stated by Turner, L.J., in *Dixon v. Wilkinson*,¹ and though there limited to the loss of the clients, was based by the Lord Justice on the duty of solicitors as officers of the Court; who "must generally be responsible to it for the due discharge of the duties which they undertake."

Stirling, J., in
In re Dangar's
Trusts.

On the authority of these cases, in *In re Dangar's Trusts*,² Stirling, J., held a solicitor liable to make good the deficiency, after first exhausting the estate which had derived the benefit, of a trust fund that had been paid over, through his negligence, to the wrong person; and made a declaration to that effect without requiring a separate action to be brought.

The Court has, nevertheless, refused to interfere summarily to compel a solicitor to pay over money borrowed for a client on security, unless the security is by deed,³ perused by the solicitor on behalf of his client, or to enforce a guarantee on which no action could be brought for money borrowed by the client.⁴

Solicitor may
be attached
under the
Debtors Act,
1869.

A solicitor may be attached for misconduct; as, for example, under the Debtors Act, 1869,⁵ s. 4, sub-sec. 4, for default "in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the Court making the order."⁶

II. Solicitor's
liability under
his retainer.
Rule laid down
by Lord Mans-
field.

II. The next branch of the subject to consider is the solicitor's liability to his client under his retainer.⁷

¹ 4 De G. & J. 508. ² 41 Ch. D. 178. ³ *In re*—an Attorney, 11 Jur. 396.

⁴ *In re Kearns*, 11 Jur. 521.

⁵ 32 & 33 Vict. c. 62.

⁶ If a man is once in a fiduciary position in respect of which he has acted, the fact that he has ceased to act will not relieve him from the liabilities he has incurred while acting in that capacity; *In re Strong*, 32 Ch. D. 342, followed *In re Gent*, *Gent-Davis v. Harris*, 40 Ch. D. 190. See *Evans v. Bear*, L. R. 10 Ch. 76, as affected by the Debtors Act, 1878 (41 & 42 Vict. c. 54) s. 1; *Marris v. Ingram*, 13 Ch. D. 338; *In re Diamond Fuel Company*, 13 Ch. D. 815. See *Buckley v. Crawford* (1893), 1 Q. B. 105, as to the limits of the Debtors Act, 1869. As to liability of solicitor for not truly describing the residence of his client, whereby defendant did not obtain security for costs in the matter of a Solicitor, 5 Times L. R. 339.

⁷ A solicitor should obtain a written authority from his client before commencing a suit. If he is obliged to commence proceedings without such authority he should obtain it as soon afterwards as he can. "An authority may be implied where the client acquiesces in and adopts the proceedings; but if the solicitor's authority is disputed, it is for him to prove it; and if he has no written authority and there is nothing but assertion against assertion, the Court will treat him as unauthorized, and he must abide by the consequences of his neglect": per Lord Langdale, M.R., *Allen v. Bone*, 4 Beav. 493. Lord Tenterden, C.J., *Owen v. Ord*, 3 C. & P. 349, says: "Every respectable attorney ought, before he brings an action, to take a written direction from his client for commencing it." See *Eley v. Positive Assurance Company*, 1 Ex. D. 20, 88. Where the relation of solicitor and client is constituted by construction, see *Morgan*

The case most frequently cited on the rule of skill to be used by a solicitor is *Pitt v. Yalden*.¹ There Lord Mansfield laid down the principle, that "not only counsel, but judges, may differ, or doubt, or take time to consider. Therefore an attorney ought not to be liable in cases of reasonable doubt." This is somewhat amplified and enforced by Abbott, C.J., in *Montrion v. Jefferys*:² "No attorney is bound to know all the law; God forbid that it should be imagined that an attorney, or a counsel, or even a judge is bound to know all the law, or that an attorney is to lose his fair recompense on account of an error, being such an error as a cautious man might fall into." Nevertheless, the solicitor cannot shift the responsibility from himself by consulting counsel where the law would presume him to have the knowledge himself;³ though the fact that he has done so may still afford him protection.

Amplified and enforced:
Montrion v. Jefferys.

Domat⁴ lays down the rule of the civil law, as applied in France, to be, that proctors, officers equivalent to solicitors, are prohibited from drawing up "writings which may serve to establish and found the rights of their clients," which business is the province of advocates; and though the law in England is not nearly so stringent, still the solicitor is most generally protected where he has referred to counsel questions of law other than those which are purely elementary,⁵ the form of the pleadings, the kind of evidence to be brought forward, or any point of grave occurrence or special intricacy.⁶

Rule of the Civil Law as to drawing up writings.

Domat⁷ continues thus: The other duties of proctors consist in acquiring a thorough knowledge of the rules of their profession, in applying themselves to the affairs committed to their charge, with such a vigilance, diligence, and care, as that their clients may not be in any way surprised, and that their causes be carried on without any delay; and likewise on their part that they observe with respect to the adverse party everything which the order of justice and a fair upright dealing may require. They are to content themselves with the ordinary fees and perquisites of their office, without exacting any more than what is settled by the rules and orders of the Court; they are to serve the poor for nothing, as they are required to do by law;

Other duties of proctors according to Domat.

v. Blyth (1891), 1 Ch. 344, at 359. See also two articles on Negligent Performance of Solicitor's Duty to Client in the *Law Journal* newspaper for 1890, 564 and 624, reprinted from the *Irish Law Times*.

¹ 4 Burr. 2060. See *Citizens' Loan, &c., Association v. Friedley*, 18 Am. St. R. 320.

² 2 C. & P. 113.

³ *Godefroy v. Dalton*, 6 Bing. 460. The authorities are collected in the argument in *Parker v. Rolls*, 14 C. B. 691, at 698.

⁴ Public Law Bk. ii. tit. 5, s. 2, art. 8.

⁵ *Bulmer v. Gilman*, 4 M. & G. 108; *Kemp v. Burt*, 4 B. & Ad. 424; *Jacks v. Bell*, 3 C. & P. 316.

⁶ *Manning v. Wilkin*, 12 L. T. (O. S.) 249; *Bracey v. Carter*, 12 A. & E. 373; *Laidler v. Elliott*, 3 B. & C. 738.

⁷ Public Law, Bk. ii. tit. 5, s. 2, art. 9.

they are to serve those who by reason of their poverty, or because of the power of their adversaries, are forced to apply to the judge to have a proctor assigned them; they are obliged to abstain from all manner of extortion, and to beware especially of the crime of compounding with their clients for what may be made of the causes with which they are charged, or for a share of it, and of treating with them in any manner which may directly or indirectly have the like effect.

Province of
judge and
jury.

Lord Denman,
C.J., in
Hunter v.
Caldwell.

The province of judge and jury respectively, in questions of solicitor's negligence, has been marked out by Lord Denman, C.J.:¹ "It was proper to direct the jury positively as to the premises from which they were to draw their conclusion. Thus, it was the province of the judge to inform the jury for what species or degree of negligence an attorney was properly answerable," "but, having done this, it was right to leave to them to say, considering all the circumstances, and the evidence of the practitioners, whether, in the first place, the attorney had performed his duty, and in the second, in case of non-performance, whether the neglect was of that sort or degree which was venial or culpable in the sense of not sustaining, or sustaining, an action."²

Where the
facts are
undisputed the
matter is for
the Court.

If the facts are undisputed the Court can determine, as a matter of law, whether the defendant's conduct is negligent or not, for "the jury is not to inquire as to that which is agreed on by the parties."³

Amount of
negligence.

The next point is to ascertain more in detail the amount of negligence that raises the presumption of liability. As to this there is some obscurity, not through uncertainty of the law, but through ambiguity in its expression.

*Crassa
negligentia*,
Purves v.
Landell.

"An attorney," says Lord Ellenborough,⁴ "is only liable for *crassa negligentia*;" and it was laid down in the House of Lords in *Purves v. Landell*⁵ that it is of the "very essence" of an action for negligence against a solicitor "that there should be negligence of a crass description, which we call *crassa negligentia*—that there should be gross ignorance." This expression must be taken not *simpliciter* as expressing the absence of ordinary care, but as indicating the absence of that care which would be ordinary in the case of a solicitor. This is manifest, both on principle and

¹ Hunter v. Caldwell, 10 Q. B. 69, at 82. *Ante*, 148 and 1191.

² See Reece v. Rigny, 4 B. & Ald. 202. As to damages, where plaintiff alleged he "was forced to pay" a certain sum, but where his liability was greater, Jones v. Lewis, 9 Dowl. Prac. Cas. 143.

³ 2 Roll. Abr. Trial (R.) 1, cited by Lord Blackburn in Dublin, Wicklow and Wexford Railway Company v. Slattery, 3 App. Cas. 1155, at 1201.

⁴ Baikie v. Chandless, 3 Camp. 17, at 20; Bulmer v. Gilman, 4 M. & G. 108; Godefroy v. Dalton, 6 Bing. 460.

⁵ 12 Cl. & F. 91, per Lord Brougham at 98. See Mahony v. Davoren, 30 L. R. Ir. 664.

from the remarks of Tindal, C.J., in *Godefroy v. Dalton*;¹ where he sums up the cases as establishing that a solicitor is in general "liable for the consequences of ignorance, or non-observance of the rules of practice of this Court;² for the want of care in the preparation of the cause for trial;³ or of attendance thereon⁴ with his witnesses;⁵ and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession.⁶ Whilst, on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction,⁷ or of such as are usually entrusted to men in the higher branch of the profession of the law."

Crassa negligentia or *culpa lata*,⁸ as understood by Lords Ellenborough and Brougham and the numerous other judges who use it in the sense we are now considering, is failure to use such skill as may be reasonably expected from a man's profession; and *culpa levis* is the legal expression of: to whom little in the way of skill is given, little is required. This is said to differ from the signification of the terms in the Roman law. There *crassa negligentia* is interpreted, not to understand what all men are supposed to understand; and *culpa levis*⁹ is fault, the result of unskilfulness in any art by its professor.¹⁰ As soon as the sense in which the terms are used is apparent, all real difficulty disappears. In both cases, both by the civil law and the English law, the skilled labourer *spondet peritiam artis*. If he does not realize his engagement in both systems he is liable. That

Consideration
of the meaning
of *crassa*
negligentia.

¹ 6 Bing. 460 at 468.

² That is, of any particular court in which the solicitor professes to practise (e.g., Mayor's Court, *Cox v. Leech*, 1 C. B. N. S. 617); *Hunter v. Caldwell*, 10 Q. B. 69; *Frankland v. Cole*, 2 Cr. & J. 590; *Huntley v. Bulwer*, 6 Bing. N. C. 111; *Stokes v. Trumper*, 2 K. & J. 232; *Russell v. Palmer*, 2 Wils. (C. P.) 325.

³ *Hawkins v. Harwood*, 4 Ex. 503.

⁴ *Swannell v. Ellis*, 1 Bing. 347.

⁵ *Reece v. Rigby*, 4 B. & Ald. 202.

⁶ *De Rouigny v. Peal*, 3 Taunt. 484; *Allison v. Rayner*, 7 B. & C. 441.

⁷ *Pitt v. Yalden*, 4 Burr. 2060; *Baillie v. Chandless*, 3 Camp. 17. It was held in the House of Lords that "a solicitor is not liable for mistake in a nice and difficult point of law, for to such mistakes all lawyers must be liable;" but if he departs from the ordinary modes of practice he must be considered as undertaking to do what was necessary to render the mode which he adopted effectual for its purpose. And if, whether from ignorance or inadvertence, he failed to do so, he must be held responsible for the consequences: *Stevenson v. Rowand*, 2 Dow & Cl. 104. See also *Kemp v. Burt*, 4 B. & Ad. 424; *Laidler v. Elliott*, 3 B. & C. 738; *Citizens' Loan &c. Association v. Friedley*, 18 Am. St. R. 320.

⁸ *Lata culpa finis est, non intelligere id, quod omnes intelligunt*: D. 50, 16, 223.

⁹ Wood, Civil Law, 106: "Unskilfulness in any art comes almost under this head, and weakness or impotency in managing any matter which is undertaken, by which danger and damage happens to others." *Nec videtur iniquum, si infirmitas culpa adnumeretur; cum affectare quisque non debeat, in quo vel intelligit, vel intelligere debet, infirmitatem suam alii periculosam futuram*: D. 9, 2, 8, § 1. See Campbell, Negligence, 11; Wharton, Negligence (2nd ed.), §§ 45, 46. *Ante*, 34.

¹⁰ See some excellent remarks by Stone, J., in *Goodman v. Walker*, 30 Ala. 482, cited in *Shearman and Redfield, Negligence* (4th ed.), § 559. n. 2.

liability is called by Roman lawyers *culpa levis*, by some English judges of the highest authority *crassa negligentia* or *culpa lata*; by both Roman lawyers and English judges is meant unskilfulness in the execution of work undertaken on the assumption of the undertaker being possessed of customary and adequate skill for its performance.

Lord Campbell
in *Purves v.*
Landell.

That there is no difference in substance between the Roman and English law appears from the remarks of Lord Campbell in *Purves v. Landell*¹ when compared with Wharton's summary of the doctrine of the Roman law. "Against the attorney, the professional adviser, or the procurator, an action may be maintained. But it is only if he has been guilty of gross negligence, because it would be monstrous to say that he is responsible for even falling into what must be considered a mistake.² You can only expect from him that he will be honest and diligent; and if there is no fault to be found either with his integrity or diligence, that is all for which he is answerable. It would be utterly impossible that you could ever have a class of men who would give a guarantee binding themselves in giving legal advice, and conducting suits at law to be always in the right." That is, the attorney, clothed, as he must be, with a special capacity, must exercise it with average diligence and skill.

Dr. Wharton
on the Civil
Law.

Wharton³ expresses the sense of the *Corpus juris* as distinguishing *culpa levis*, slight or special negligence, the lack of such diligence as a good business man would shew in a transaction relating to his business, from *lata culpa*, gross or ordinary negligence, the neglect of the ordinary care that is taken by persons not specialists. *Non intelligere quod omnes intelligunt* is the test applicable in the case of the non-specialist. The specialist is judged by the standard of skill applicable to a specialist, and his actionable shortcoming is *culpa levis*; the non-specialist is thus judged by a less severe standard than that applied to the conduct of the specialist, and his default marks *culpa lata*. The English usage has probably grown from contrasting *levis* with *lata culpa* in the same class; as if they were synonymous with little and much negligence; whereas, if the interpretation of the civilians by Wharton be right (and there is at least the probability in its favour arising from its intrinsic plausibility) the distinction indicated by the two phrases is between different classes of negligence, and not a mere

¹ 12 CL. & F. 91, at 103. Cp. *Hamilton v. Emslie*, 7 Macph. 173.

² Or, as Stuart, V.C., says in *Chapman v. Chapman*, L. R. 9 Eq. 276, at 296: "In a question between solicitor and client as to loss from negligence, there must be negligence of a gross and palpable kind to give a right to relief." The judgment goes on to state that "imprudent or indiscreet" conduct is not actionable when standing alone.

³ Negligence (2nd ed.), § 59. See, to the same effect, *Poste Gaius* (3rd ed.), 452, 478; *Sanders Justinian* (8th ed.), 324.

distinction in the grading of a particular class. The one is, according to this view, applicable to men of business in their business transactions, the other to them in matters in which they did not profess skill.¹

If a solicitor acts as solicitor, the question whether he is remunerated or not does not affect his liability; in either event he is bound to discharge his duties with a care and diligence equal to that ordinarily required of solicitors of competent skill and care.² The same holds good whether he is certificated or not; even though in the latter event he employs a certificated solicitor in the work.³

Remuneration
does not affect
liability.

The general rule is that whatever is important for the client to know, it is the duty of the solicitor to report to him; and failure to report is a ground for an action of negligence by the client against the solicitor.⁴

General rule.

When once a solicitor is retained he becomes disentitled to accept any business conflicting with his client's;⁵ if he does, and his client is injured, he has his remedy either by action or by invoking the summary jurisdiction of the Court. The fact that a solicitor is retained to defend an action being proved, coupled with the fact that he has done nothing and that judgment has been suffered to go by default, throws the *onus* on him to shew that there was no negligence.⁶

A solicitor is liable for negligence both in contract and in tort. He is liable in contract where he fails to do some specific act to which he has bound himself.⁷ He is liable in tort where, having

Liability both
in contract
and tort.

¹ *Ante*, 36.

² *Donaldson v. Haldane*, 7 Cl. & F. 762; *Stevenson v. Rowand*, 2 Dow & Cl. 104; *Lang v. Struthers*, 2 Wils. & Shaw (H. L. Sc.) 563. A solicitor cannot give up his client and act for the opposite party in any suits between them: 2 Wils. and Shaw (H. L. Sc.), 563. *Earl Cholmondeley v. Lord Clinton*, 19 Ves. 261; *Little v. Kingswood Collieries Company*, 20 Ch. Div. 733.

³ *Brown v. Tolley*, 31 L. T. (N. S.), 485.

⁴ *Foy v. Cooper*, 2 Q. B. 937.

⁵ *Johnson v. Marriott*, 2 Cr. & M. 183; *Grissell v. Peto*, 9 Bing. 1; *The Masons' Hall Tavern Company v. Nokes*, 22 L. T. (N. S.), 503; as to what acts a solicitor is bound to do when he has a special retainer, *Dawson v. Lawley*, 4 Esp. (N. P.) 65; and where he has an unlimited discretion, *Anderson v. Watson*, 3 C. & P. 214.

⁶ *Godefroy v. Jay*, 7 Bing. 413; *Bourne v. Diggles*, 2 Chit. (K. B.) 311. The privilege of a solicitor not to be required to disclose their client's business is discussed in *Annesley v. Anglessea*, 17 How. St. Tr. 1139, at 1224, where it is contended also to be a privilege of the client. In giving their decision the Court distinguished at 1239: "Now," said Bowes, C.B., "do I see any impropriety in supposing the same person to be trusted in one case as an attorney or agent, and in another as a common acquaintance. In the first instance, the Court will not permit him, though willing, to discover what came to his knowledge as an attorney, because it would be in breach of that trust which the law supposes to be necessary between him and his employer; but where the client talks to him at large as a friend, and not in the way of his profession, I think the Court is not under the same obligations to guard such secrets, though in the breast of an attorney. If I employ an attorney and entrust to him secrets relative to the suit, that trust is not to be violated; but when I depart from that subject wherein I employed him, he is no more than another man." Cp. *Anderson v. Bank of British Columbia*, 2 Ch. Div. 644; *Southwark and Vauxhall Water Company v. Quick*, 3 Q. B. Div. 315; *Bewicke v. Graham*, 7 Q. B. Div. 400.

⁷ *Marzettii v. Williams*, 1 B. & Ad. 415. Cp. *Blyth v. Fladgate* (1891), 1 Ch. 337, at 366.

accepted a retainer, he fails in the performance of any duty which the relation of solicitor and client as defined by the retainer imposes on him.¹ Where the liability is based upon tort to enable the client to recover, damage has to be shewn;² further the damage must result from the negligent act, and not be merely collateral to it. This is illustrated by what happened in *Hewitt v. Melton*,³ an action for false representations by an attorney. The damage alleged was that in the suit out of which the action arose the plaintiff's debtor was discharged; however, the action was held not maintainable on it appearing that the discharge was not owing to the falsehood but to the informality of the document.

Hewitt v. Melton.

Where action at common law no remedy in equity.

Right of action.

If an action for negligence at common law can be brought, it has been decided that the Courts will not give a remedy in equity.⁴

The right of action for negligence survives to the personal representative,⁵ or to the trustee in bankruptcy of the client,⁶ against the solicitor's representatives;⁷ and if within the scope of partnership-dealings, against the representatives of an innocent partner.⁸

Measure of damage.

The measure of damages is the difference in the pecuniary position of the client from what it should have been had the solicitor acted without negligence.⁹

Statute of Limitations.

In actions for negligence the Statute of Limitations¹⁰ runs from the time of the doing of the injurious act, or from the earliest time at which an action could be brought.¹¹ The leading case on the subject is *Howell v. Young*.¹² Defendant had been retained in the year 1814 to ascertain whether a warrant of attorney and certain mortgages were sufficient security for a loan, and represented that they were. In the year 1820, the interest

Howell v. Young.

¹ *E.g.*, *Fray v. Voules*, 1 E. & E. 839; see per Lord Campbell, C.J., *Brown v. Boorman*, 11 Cl. & F. 1, at 44; per Jervis, C.J., *Courtenay v. Earle*, 10 C. B. 73, at 83; also per Maule, J., *Howard v. Shepherd*, 9 C. B. 297, at 319.

² *Westaway v. Frost*, 17 L. J. Q. B. 286. See the note to *Hill v. Finney*, 4 F. & F. 616, at 634.

³ 1 Cr. M. & R. 232; *Miller v. Wilson*, 24 Pa. St. 114.

⁴ *British Mutual Investment Company v. Cobbold*, L. R. 19 Eq. 627; *Brooks v. Day*, 2 Dick. (Ch.) 572; *Mare v. Lewis*, Ir. R. 4 Eq. 219. Cp. the Judicature Act, 1873 (36 & 37 Vict. c. 66) s. 23.

⁵ *Knights v. Quarles*, 2 B. & B. 102, considered *Daly v. Dublin, Wicklow & Wexford Railway Company*, 30 L. R. Ir. 514.

⁶ *Crawford v. Cinnamon*, 15 W. R. 996.

⁷ *Wilson v. Tucker*, 3 Stark. (N. P.) 154; *Re Keeping and Glog*, 58 L. T. 679.

⁸ *Morgan v. Blyth* (1891), 1 Ch. 344; *Sawyer v. Goodwin*, 1 Ch. D. 351, *Thomson v. Robinson*, 16 Ont. App. 175.

⁹ *Whiteman v. Hawkins*, 4 C. P. D. 13; *Godefroy v. Jay*, 7 Bing. 413.

¹⁰ 21 James I. c. 16.

¹¹ *Hemp v. Garland*, 4 Q. B. 519; *Reeves v. Butcher* (1891), 2 Q. B. 509. If one plaintiff be away, but the others in the country, the action must be brought within six years of the cause arising: *Perry v. Jackson*, 4 T. R. 516.

¹² 5 B. & C. 259; *Smith v. Fox*, 6 Hare 386; *Dooby v. Watson*, 39 Ch. D. 178; *Bullen and Leake, Prec. of Plead.* (3rd ed.), 83, 84; *Sawyer v. Goodwin*, 36 L. J. Ch. 578; *Darby & Bosanquet, Statutes of Limitation* (2nd ed.), 40; *Miller v. Wilson*, 24 Pa. St. 114.

having been regularly paid to that time, the security was discovered to be insufficient. An action was then brought for negligence of the defendant in being satisfied with insufficient security. The defendant pleaded the Statute of Limitations,¹ and succeeded on his plea. "I think," said Holroyd, J.,² "it makes no difference in this respect, whether the plaintiff elects to bring an action of assumpsit founded upon a breach of promise, or a special action on the case founded upon a breach of duty. The breach of promise or of duty took place as soon as the defendant took the insufficient security. Whether the plaintiff, therefore, elect to sue in one form of action or another, the cause of action, which in either form is substantially the same, accrued at the same moment of time. The breach of duty, therefore, constituting a cause of action, it follows that the Statute of Limitations is a bar to this action, unless the special damage alleged in the declaration constitute a new cause of action."³ This the Court decided it did not do.⁴

Judgment of
Holroyd, J.

III. In addition to his remedy by action, the client may raise the question of negligence by resisting the claim of the solicitor for his remuneration on the ground of negligence. To do this effectually, not only must he shew that he has derived no benefit from the services of the solicitor, but also that the failure results wholly from the plaintiff's negligence, and not partly from accident.⁵ This is a question for the jury.⁶

III. Client
may raise the
question of
negligence by
resisting the
claim of the
solicitor for
his remunera-
tion.

Under the Judicature Acts the defendant can counter-claim; and thus, in the event of a failure to establish the worthlessness of the plaintiff's intervention, may secure an abatement from his bill proportioned to the inefficiency of the service rendered.

Counter-claim.

We are now to consider in detail the chief heads of a solicitor's

Heads of
negligence.

¹ 21 James I. c. 16.

² 5 B. & C. at 266.

³ *Hony v. Hony*, 1 S. & S. 568; *Whitehead v. Howard*, 2 B. & B. 372; *Fetter v. Beale*, 1 Salk. 11.

⁴ The Statute of Limitations in cases of tort arising *quasi ex contractu* generally runs, as we have seen, from the date of the tort, and not from the occurrence of actual damage. There is an exception to this where the original act itself was no wrong, and only becomes so by reason of subsequent damage—*e.g.*, in the case of an excavation where damages have been recovered for the injury caused—but where there is a new subsidence proceeding from the original act of the defendant. Till the occurrence of which there is no actionable injury; the statute runs from the new subsidence, *Darley Main Colliery Company v. Mitchell*, 11 App. Cas. 127; *Crumbie v. Wallend Local Board* (1891), 1 Q. B. 503; *Darby & Bosanquet*, *Statutes of Limitations* (2nd ed.), 46. Ignorance of the facts will be no excuse, nor is the success of dilatory tactics a ground for adopting another method of reckoning: *East India Company v. Paul*, 7 Moo. P. C. C. 85, per Lord Campbell, at 110. The maxim *Ignorantia legis neminem excusat* is copiously treated and illustrated, 1 Story, Eq. Jur. §§ 111–139. A right arising from a tort cannot be revived by acknowledgment: *Hurst v. Parker*, 1 B. & Ald. 92; *Tanner v. Smart*, 6 B. & C. 603. The rule as to what is a sufficient acknowledgment to revive a debt is to be found in *Green v. Humphreys*, 26 Ch. Div. 474.

⁵ *Dax v. Ward*, 1 Stark. (N. P.) 409, and the cases cited in the note to *Pasmore v. Birnie*, 2 Stark. (N. P.) 59.

⁶ *Bracey v. Carter*, 12 A. & E.

negligence in respect of his retainer, under the headings (1) of negligence in managing litigation, and (2) negligence in matters not in litigation.

I. In litigation.

I. Negligence in managing litigation.

A retainer to a solicitor in an action authorizes him to conduct it to final judgment and execution.¹ A solicitor must get explicit instructions from his client before commencing an action. If it is not possible to have a personal interview with his client, the need of obtaining definite instructions is only made the more imperative.² The rule is that a special authority must be shewn to justify instituting a suit, though a general authority is sufficient to warrant defending one.³ If special authority is wanting, the solicitor taking legal proceedings is liable to the person for whom he thus professes to act without authority,⁴ as well as to any one who is prejudiced by his action.⁵

Solicitor should : acquaint his client with the prospect of failure, &c.

A solicitor is liable for negligence for not representing to his client the certainty of failure, where a cause of action is desperate, before committing the client to actual proceedings, even where he has the client's positive instructions to proceed ;⁶ or for proceeding before the facts have been so far ascertained as to determine whether there be a right of action.⁷

His client's interest his chief concern.

He is liable for proceeding under a wrong section of an Act of Parliament, even where justices have, in the first instance, actually committed the person charged.⁸ He must communicate

¹ *Brackenbury v. Pell*, 12 East 585 ; *Lawrence v. Harrison*, Style 426. In America an attorney is not bound to move for a new trial upon a point of law, *Hastings v. Halleck*, 13 Cal. 203, *United States Digest* for 1860, Attorney and Counsel, pl. 40 ; nor to institute new collateral suits, such as actions against the sheriff and clerk for the failure of their duty, without instructions, *Pennington v. Yell*, 6 Eng. (Ark.) 212, *United States Digest* for 1853 (Putman), Attorney and Counsel, pla. 24-32. An attorney of a Court of Record who appears for a party is regarded as having *prima facie* an authority to appear for him : *Hill v. Mendenhall*, 21 Wall. (U.S.) 453.

² *Gill v. Lougher*, 1 Cr. & J. 170 ; *Barker v. Fleetwood Improvement Commissioners*, 62 L. T. 831. *Ante*, 1422 n⁷.

³ *Wright v. Castle*, 3 Meriv. 12.

⁴ *Westaway v. Frost*, 17 L. J. Q. B. 286 ; *Hubbart v. Phillips*, 13 M. & W. 702. The *onus* of proving authority is on the solicitor, *Hoakins v. Phillips*, 16 L. J. Q. B. 339 ; *Dupen v. Keeling*, 4 C. & P. 102. Where an attorney brings an action without the authority of the plaintiff, the plaintiff is entitled to have the proceedings stayed as against the defendant without payment of costs, *Reynolds v. Howell*, L. R. 8 Q. B. 398. In any case a solicitor appearing for another without his assent is precluded from recovering his costs from the party himself, *Sparrier v. Allen*, 2 C. & K. 210 ; *Hall v. Laver*, 4 Y. & C. (Ex.) 216 ; or by lien, *Abbott v. Rice*, 3 Bing. 132.

⁵ *Andrews v. Hawley*, 26 L. J. Ex. 323, a case where a third person instructed the attorney falsely pretending to be the plaintiff's partner. There must be an allegation that legal damage has been sustained, *Cotterell v. Jones*, 11 C. B. 713 ; but see *Quartz Hill Gold Mining Company v. Eyre*, 11 Q. B. Div. 674.

⁶ *In re Clark*, 1 De G. M. & G. 43. See *Jacks v. Bell*, 3 C. & P. 316, per Lord Tenterden, C.J., on the duty of the solicitor to dissuade his client ; also the same judge as reported 2 Chitty, General Practice, c. i. 22, n. ; *Ortley v. Gilby*, 14 L. J. Ch. 177 ; *Lawrence v. Potts*, 6 C. & P. 428.

⁷ *Thwaites v. Mackerson*, 3 C. & P. 341 ; *De Montmorency v. Devereux*, 7 Cl. & F. 188.

⁸ *Hart v. Frame*, 6 Cl. & F. 193 ; *Smith v. Grant*, 20 Dunlop, 1077.

to his client any offer of compromise made in pending litigation, and is not allowed to go on for the purpose of recovering his own costs, and with the alternative remaining open that, failing in this, he may charge them to his own client. Since it is the solicitor's duty to communicate such an offer, he is presumed to have done his duty till the contrary is shewn.¹ But, says Lord Campbell, C.J., in the course of the argument in *Fray v. Voules*,² "If an action were brought for a £100, surely the plaintiff's attorney might accept an offer of £99 10s. without previously communicating with his client:" and, in giving judgment,³ "An attorney retained to conduct a cause is entitled, in the exercise of his discretion, to enter into a compromise, if he does so reasonably, skilfully, and *bona fide* (as the defendant is to be taken as having done), provided always, that his client has given him no express directions to the contrary; but where these directions have been given, such a step, though perhaps binding as between him and third parties, is *ultra vires* as between him and his client."⁴ This rule was followed by the Court of Common Pleas in *Chown v. Parrott*,⁵ and again in *Prestwich v. Poley*,⁶ and has been repeatedly recognised as established law.⁷

May compromise.

There is no greater latitude allowed a solicitor in making a compromise than in his other business as a solicitor; so that if the solicitor in making a settlement acts in a way inconsistent with the diligence and care which good business men of his class are accustomed to shew in that description of business, he exposes himself to an action for negligence;⁸ yet the compromise arrived at as against his client, holds good unless its features are such as to imply fraud.⁹

Provided that he exercises diligence and care in so doing.

In making the preliminary investigations before instituting proceedings the solicitor's duty is specially to consider—

What preliminary investigation the solicitor is required to take.

1. Whether there is any, and what, right of action;
2. Whether it is affected by the Statute of Limitations;

¹ *Sill v. Thomas*, 8 C. & P. 762.

² 1 E. & E. 839, at 345, distinguished *Tucker v. Cotterell*, 34 W. R. 323; *Jeffries v. Mutual Life Assurance Company*, 110 U. S. (3 Davis) 305.

³ 1 E. & E. at 847.

⁴ *Wright v. Johnston*, 1 F. & F. 128.

⁵ 14 C. B. N. S. 74.

⁶ 18 C. B. N. S. 806.

⁷ *Strauss v. Francis*, L. R. 1 Q. B. 379, at 382; *Matthews v. Munster*, 20 Q. B. D. 141.

⁸ *Chambers v. Mason*, 5 C. B. N. S. 59.

⁹ *Marshall, C.J.*, thus expresses the American rule in *Holker v. Parker*, 7 Cranch (U. S.) 436, at 452: "Although an attorney at law, merely as such, has, strictly speaking, no right to make a compromise; yet a Court would be disinclined to disturb one which was not so unreasonable in itself as to be exclaimed against by all, and to create an impression that the judgment of the attorney has been imposed on, or not fairly exercised in the case. But where the sacrifice is such as to leave it scarcely possible that, with a full knowledge of every circumstance, such a compromise could be fairly made, there can be no hesitation in saying that the compromise being unauthorized, and being therefore in itself void, ought not to bind the injured party. Though it may assume the form of an award or of a judgment at law, the injured party, if his own conduct has been perfectly blameless, ought to be relieved against it."

3. Whether any preliminary notice or demand is required; and,
4. Who are the proper parties against whom the action is to be brought.¹

Palpable negligence in any of these particulars, whether arising from want of acquaintance with law or from defective apprehension of the facts, constitutes a cause of action against the solicitor; for it is deemed essential for the client to have the benefit of his solicitor's advice and judgment in the conduct of the suit; in the management of which the solicitor is required to be reasonably competent.²

Difficult
points of law.

Where difficult points of law arise, the solicitor is generally protected by counsel's opinion, though not as to the proper practical proceedings to be taken.³ Even here, if a matter arise on which doubt can reasonably be entertained, he will not be held liable:⁴ nor yet if he have *carefully* drawn a case and obtained an explicit opinion of an experienced counsel and acted strictly within his directions.⁵

Ordinary
procedure in
an action.

A solicitor has been held liable for blunders and mistakes in drawing up an order or rule;⁶ for bringing an action in a court which has no jurisdiction;⁷ or for suing in a superior court when he should have brought the action in a county court;⁸ for laying the venue in the wrong county;⁹ for administering interrogatories for examination in chief, under the old Chancery practice, of an adverse witness already examined on the other side, instead of cross interrogatories;¹⁰ for disobeying the lawful instructions of his client, though acting in good faith, and honestly thinking to advance his client's interest;¹¹ for not seeing that a foreign bill sued on complies with the formalities of the foreign law applicable;¹² for neglecting to deliver briefs to counsel in time for

¹ Pulling, *Law relating to Attorneys* (3rd ed.), 175-179.

² *Hopkinson v. Smith*, 1 Bing. 13; *Harvey v. Mount*, 8 Beav. 439, at 454; *Baker v. Loader*, L. R. 16 Eq. 49.

³ *Russel v. Palmer*, 2 Wils. (C. P.) 325; *Swannell v. Ellis*, 1 Bing. 347.

⁴ *Laidler v. Elliott*, 3 B. & C. 738; *Baikie v. Chandless*, 3 Camp. 17.

⁵ *Kemp v. Burt*, 4 B. & Ad. 424. In submitting a case to counsel he must have acted *bona fide*; *Andrew v. Hawley*, 26 L.J. Ex. 323.

⁶ *Re Bolton*, 9 Beav. 272. *In re Massey and Carey*, 26 Ch. Div. 459.

⁷ *Williams v. Gibbs*, 5 A. & E. 208.

⁸ *Lee v. Dixon*, 3 F. & F. 744. The report of this case is confused, the point of the report appearing best in the note of Bramwell, B.'s, summing up on the second trial in the note at 749. Cp. *Barker v. Fleetwood Improvement Commissioners*, 62 L. T. 831, where an action was brought in the Palatine Court that could have been brought in the County Court. It was held the doing so was not negligence and imposed no penalty, either by deprivation of costs or otherwise upon suitors using its machinery, see *s.c.* 6 Times L. R. 430 (C. A.).

⁹ *Kemp v. Burt*, 4 B. & Ad. 424; but see now R. S. C. 1883, Order xxxvi. 1.

¹⁰ *Stokes v. Trumper*, 2 K. & J. 232; see R. S. C. 1883, Order xxxvii. r. 1.

¹¹ *Cox v. Livingston*, 2 Watts & S. (Pa.) 103.

¹² *Long v. Orsi*, 18 C. B. 610.

the trial;¹ for neglecting to furnish counsel with materials adequate for dealing with the case, failing which he withdrew the record;² for not subpoenaing the requisite witnesses;³ for omitting to procure their attendance at the trial;⁴ for not attending at the trial;⁵ or before the arbitrator in the case of a reference;⁶ for misreading the date of a notice of trial;⁷ for not taking steps to set aside an irregular order;⁸ for negligently making an erroneous statement to the Court, so that a wrongful order is procured;⁹ for want of diligence in the prosecution of the decree;¹⁰ for neglecting to compel a receiver to pass accounts;¹¹ for neglect in complying with an order for passing publication;¹² for allowing judgment to go by default,¹³ for discharging a defendant from custody without receiving satisfaction;¹⁴ for not charging a prisoner defendant in execution;¹⁵ for not duly entering up judgment,¹⁶ and, *prima facie*, issuing

¹ *Rex v. Tew*, Sayer 50; *De Ronfligny v. Peale*, 3 Taunt. 484, where a new trial was granted "upon payment by the defendant's attorney, out of his pocket, of all costs as between attorney and client"; *Hoby v. Built*, 3 B. & Ad. 350; *Townley v. Jones*, 8 C. B. N. S. 289, where a new trial was granted on the terms of the attorney paying the costs of the day out of his own pocket, "otherwise it will be discharged."

² *Hawkins v. Harwood*, 4 Ex. 503.

³ *Price v. Bullen*, 3 L. J. K. B. (O.S.) 39.

⁴ *Reece v. Righv*, 4 B. & Ald. 202; *Dax v. Ward*, 1 Stark. (N. P.) 409. If it is the party's own act that they are not called he is not to be heard to complain, at any rate so far as any interference with the rights of the other party acquired under a judgment is involved: *Wright v. Soreaby*, 2 Cr. & M. 671.

⁵ *Nash v. Swinburne*, 3 M. & G. 630.

⁶ *Swannell v. Ellis*, 1 Bing. 347; *Dauntley v. Hyde*, 6 Jur. 133. The solicitor is not answerable for neglect of counsel, *Lowry v. Guilford*, 5 C. & P. 234. This was the case of counsel being in another Court and the attorney absent. In arguing for the defendant Sir J. Scarlett said: "In the King's Bench if the attorney and counsel are both absent the case is lost, and no new trial will be granted; but if the attorney stays and says that his counsel is at the Rolls, or any other Court near, he would be sent for, instead of the cause being struck out." As to solicitor's duty with regard to sending to a reference, *Chapman v. Van Toll*, 27 L. J. Q. B. 1; also *Smith v. Troup*, 7 C. B. 757; *Faviell v. Eastern Counties Railway Company*, 2 Ex. 344.

⁷ *Nash v. Swinburne*, 3 M. & G. 630.

⁸ *In re Spencer*, 39 L. J. Ch. 841.

⁹ *— v. Jolland*, 8 Ves. 72.

¹⁰ *Godefroy v. Jay*, 7 Bing. 413.

¹¹ *Russel v. Palmer*, 2 Wils. (C. P.) 325.

¹² *Flower v. Bolingbroke*, 1 Str. 639. The proposition is not decided by, but is merely an inference from, the case. See, however, *Hett v. Pun Pong*, 18 Can. S. C. R. 290, where Strong, J., says at 295: "I am of opinion, however, that consistently with the authorities it cannot be held that a retainer to prosecute an action terminates with the recovery of the judgment, nor that such a retainer does not by itself make it the duty of the attorney or solicitor without further instructions to proceed after judgment and endeavour to obtain the fruits of the recovery" including the making it by registration, a charge on the lands of the judgment debtor. For this he cites *Lady de la Pole v. Dick*, 29 Ch. Div. 351, following *Lawrence v. Harrison*, Style 426. As to the scope of a solicitor's authority to bind his principal, *Jarman v. Hooper*, 6 M. & G. 827, distinguished in *Smith v. Keal*, 9 Q. B. D. 340, which was followed, *Morris v. Salberg*, 22 Q. B. D. 614. For the position of solicitor to trustees, *Stanier v. Evans*, 34 Ch. D. 470, per North, J., at 477: "He is not solicitor to the trust estate. He has no retainer from the trust estate, but he is the person employed by the trustee for his own purposes as trustee. His retainer is by the trustee personally. The trustee personally is liable to pay his costs, and the trustee personally is the only person to whom the solicitor can look for those costs."

¹³ *Frankland v. Cole*, 2 Cr. & J. 590.

¹⁴ *Ridley v. Tiplady*, 20 Beav. 44.

¹⁵ *Frankland v. Cole*, 2 Cr. & J. 590.

¹⁶ *Bevins v. Hulme*, 15 M. & W. 88.

execution;¹ and for neglecting to set aside irregular proceedings.²

Where solicitor's negligence conduces to the conviction of his client.

Where the negligence alleged is that the plaintiff was convicted in previous proceedings through the default of the solicitor, the plaintiff is not bound to prove that the negligence was the exclusive reason of the conviction: "If the defendants' negligence *largely contributed* to the result, they would be answerable for such damages as" might be thought just in all the circumstances.³

Solicitor may not capriciously retire from a case he has undertaken.

When a solicitor is retained to conduct an action he is bound to carry it on to its termination,⁴ unless he give reasonable notice to the contrary, or the client dies;⁵ thus it was held in *Hoby v. Built*⁶ too late to refuse to deliver briefs four days before the commission day of the assizes.

If due notice is given by the solicitor, the fact that he is not furnished with money entitles him to be relieved of his duty in the action.⁷ The giving of reasonable notice is necessary, otherwise the absence of funds would not excuse him.⁸

Advice to discontinue a good case not necessarily negligent.

A solicitor is not liable for advising his client not to go on with a case, unless the client can shew not only that he had a good case, but also that the solicitor was, or ought to have been, aware of it.⁹ It is doubtful whether even this is not too narrow a statement of the law; since it may well be that a man has a good case, of which his solicitor is aware, yet which it is in the highest degree inexpedient to prosecute. Where this is the case another duty to his client—which is, not to advise merely as to the legal,

¹ *Harington v. Binns*, 3 F. & F. 942; *Union Bank of Georgetown v. Geary*, 5 Peters (U. S.) 99, at 113. In the United States, an attorney at law is entitled in virtue of his general authority to take out execution upon a judgment recovered by him for his client, and to receive the money due, and thus discharge the execution. Further, "if the judgment debtor has a right to redeem the property sold under the execution within a particular period of time by payment of the amount to the judgment creditor, who has become the purchaser of the property, there is certainly strong reason to contend that the attorney is impliedly authorized to receive the amount, and thus indirectly to discharge the lien on the land": per Story, J., *Erwin v. Blake*, 8 Peters (U. S.) 18, at 25. Cp. *Dearborn v. Dearborn*, 15 Mass. 316, a case of neglecting seasonably to sue out a *scire facias* on a bail bond.

² *Godefroy v. Jay*, 7 Bing. 413. As to solicitor's liability for wrongly describing plaintiff's place of residence in writ of summons, *In the Matter of a Solicitor*, 5 Times L. R. 339.

³ *Hatch v. Lewis*, 2 F. & F. 467, per Pollock, C.B., at 485.

⁴ *Nicholls v. Wilson*, 11 M. & W. 106. Cp. *United States v. Curry*, 6 How. (U. S.) 106, per Taney, C.J., delivering the opinion of the Court, at 111.

⁵ *Whitehead v. Lord*, 7 Ex. 691. See *In re Cartwright*, L. R. 16 Eq. 469, and the limitation suggested by Lindley, L.J., *Beck v. Pierce*, 23 Q. B. Div. 316, at 323, to "such continuous work as bringing and prosecuting an action."

⁶ 3 B. & Ad. 350; *Wadsworth v. Marshall*, 2 Cr. & J. 665; *Gleason v. Clark*, 9 Cowen (N. Y.) 57.

⁷ *Rowson v. Earle*, M. & M. 538; *Van Sandau v. Browne*, 9 Bing. 402, explained in *Underwood v. Lewis* (1894), 2 Q. B. 306.

⁸ *Nicholls v. Wilson*, 11 M. & W. 106.

⁹ *Hill v. Finney*, 4 F. & F. 616.

but as to the practical, aspects of the case¹—would not be performed did the solicitor not dissuade him from its prosecution.

A solicitor is not liable for negligence when the damage arises from the error of the judge in making an order at chambers;² nor for pleadings, if drawn by a pleader;³ nor for refusing to insert matter in pleadings against his own view at the instance of his client;⁴ nor for a mistake in evidence if he has taken counsel's opinion;⁵ nor for the absence of counsel at the trial;⁶ nor because witnesses whose proofs have been taken are not called on the trial, since this is "entirely for counsel";⁷ nor for anything within the province of counsel at the trial; nor for omitting to move for a new trial without instructions to do so;⁸ nor for refusing to follow his client's instructions to do what is merely designed for delay;⁹ nor for preparing a joint warrant of attorney from two, so as not to guard against the effects of one of them dying before the judgment;¹⁰ nor for drawing under counsel's advice an agreement bad for champerty, and for suing thereon;¹¹ nor when he accepts as a correct exposition of the law a decision of a competent court, even though in fact such decision is erroneous.¹²

In the case of a solicitor, acting merely as the officer of the Court, handing over papers which may be afterwards acted upon, with no more active intervention than that of a postman who conveys a letter, he is not liable if a warrant he may so hand over proves bad.¹³ If, however, he deliberately directs the execution of a warrant, he thereby takes on himself the chance of all bad consequences.¹⁴

II. Negligence in matters not in litigation.

(1) In the course of business between vendors and purchasers.

The solicitor should inquire whether a thing proposed to be

Where
solicitor not
liable for
mistakes.

Solicitor
handing over
papers.

II. Negligence
in matters not
in litigation.
1. Vendors and
purchasers.

¹ *Jacks v. Bell*, 3 C. & P. 316; and 2 Chitty, General Practice, c. 1, 22. The whole of this chapter, Of the Retainer of a Legal Agent, may profitably be referred to.

² *Laidler v. Elliot*, 3 B. & C. 738.

³ *Manning v. Wilkin*, 12 L. T. (O.S.) 249. ⁴ *Ibbotson v. Shippey*, 23 Sol. Jour. 388.

⁵ *Andrews v. Hawley*, 26 L. J. Ex. 323.

⁶ *Lowry v. Guilford*, 5 C. & P. 234. In a Mayor's Court case, a solicitor acting as advocate was held liable to his client for failure to attend a police court: *Fergusson v. Lewis*, Law Journal Newspaper for 1879, at 700. See *Solicitors as Advocates*, *Clarke v. Couchman*, Law Journal Newspaper for 1885, at 318.

⁷ *Hatch v. Lewis*, 2 F. & F. 467, at 482.

⁸ *Fray v. Foster*, 1 F. & F. 681.

⁹ *Johnson v. Alston*, 1 Camp. 176. In *Pierce v. Blake*, 2 Salk. 515, Holt, C.J., said: "If he [the attorney] puts in a false plea to delay justice, breaks his oath, and may be fined for putting a decision upon the Court."

¹⁰ *Kettle v. Wood*, 5 L. J. (O. S.) K. B. 173.

¹¹ *Potts v. Sparrow*, 6 C. & P. 749.

¹² *Marsh v. Whitmore*, 21 Wall. (U. S.), 178.

¹³ *Carratt v. Morley*, 1 Q. B. 18.

¹⁴ *Green v. Elgie*, 5 Q. B. 99; see Law Mag. (N. S.) vol. iii. (1845), 339. The right of lien on law papers is treated, Bell, Comm. (7th ed.), vol. ii. 107-109. See also the very full collection of cases in Bell, Principles of the Law of Scotland (9th ed.), § 219 (7) 143-147, where all the Scotch cases appear to be collected.

sold may legally be the subject of bargain and sale, that is, whether the bargain is not affected by fraud or immorality, or with regard to matters against public policy.¹ He is to ascertain whether the parties to the proposed contract have contractual capacity;² he must take care that his client does not enter into any covenant or stipulation that may expose him to a greater degree of responsibility than is ordinarily attached to the business in hand, or at least does not do so till the consequences have been explained to him;³ and he must not voluntarily and unnecessarily divulge defects in his client's title.⁴ On the other hand, a solicitor is liable if he allows his client to take a bare possessory title⁵ without calling his attention to the fact.

Duty of solicitor with reference to abstract.

It is the duty of the vendor's solicitor to deliver a sufficient abstract of title where the necessary investigations are not made in the course of the negotiations; and of the purchaser's solicitor not merely to see that what is abstracted is correctly stated, but also that all that is material is stated.⁶ Thus, a solicitor ought not to content himself with a particular extract of a will furnished by his client, unless something pass between him and his client which shews that it is unnecessary to consult the original.⁷ In *Bryant v. Bush*⁸ there are expressions that would support the narrower duty; they are, however, merely *obiter dicta*, negating an alleged duty on the part of a purchaser's solicitor to inform himself of the names of the attesting witnesses to title-deeds, with a view to the production of evidence in the event of the destruction of the deeds.

Liability of solicitor for loss occasioned by omission to make searches.

The solicitor's duty is only with reference to direct and immediate, and not to possible and future, requisites. In considering the effect of abstracts, he must avoid drawing wrong conclusions from the deeds laid before him, though there is no duty on him to know their legal operation. If he does not consult counsel, he assumes the risk of going wrong.⁹ There is

¹ *E.g.*, as in *Fores v. Johns*, 4 Esp. (N. P.) 97; *Hughes v. Done*, 1 Q. B. 294; *Græme v. Wroughton*, 11 Ex. 146. See *Sale of Goods Act*, 1893 (56 & 57 Vict. c. 71) s. 61 sub-ss. 2, 3.

² *Pulling, Attorneys*, 229, citing *Co. Litt.* 172 a.

³ *Stannard v. Ullithorne*, 10 Bing. 491.

⁴ *Taylor v. Blacklow*, 3 Bing. N. C. 235; *Barber v. Stone*, 50 L. J. C. P. 297. Cp. per *Kelly, C.B.*, *Hardy v. Veasey*, L. R. 3 Ex. 107, at 111. *Com. Dig.* Action upon the Case for Deceit (A 5).

⁵ *Allen v. Clark*, 7 L. T. (N. S.) 781; *Brooks v. Day*, 2 Dick. (Ch.) 572; *Arnot v. Biscoe*, 1 Ves. Sen. 95. In *Potts v. Dutton*, 8 Beav. 493, a solicitor was made to bear the expense of drawing a conveyance where the title-deeds were out of the vendor's possession to his knowledge; and in consequence of which the sale went off.

⁶ *Sugden, Vendors & Purchasers* (14th ed.) 411, citing *Kennedy v. Green*, 3 My. & K. 699; *Mahony v. Davoren*, 30 L. R. Ir. 664.

⁷ *Wilson v. Tucker*, 3 Stark. (N. P.) 154. *In re Keeping and Gloag*, 58 L. T. 679.

⁸ 4 Russ. 1.

⁹ *Ireson v. Pearman*, 3 B. & C. 799.

authority¹ for saying that a solicitor is liable to his client for loss occasioned by his omission to make any of the numerous searches which may by possibility disclose matter affecting the title. But it is pointed out in a work of great authority² that there is a general practice to make certain specified searches, and no more; and a doubt is expressed whether a solicitor would be liable for one of these omissions which are sanctioned by general practice. The solution of this doubt appears to be given by Tindal, C.J.,³ when he says: "This [what constitutes the exercise of reasonable and proper care, skill, and judgment] is a question of fact, the decision of which appears to us to rest upon this further inquiry—viz., whether other persons, exercising the same profession or calling, and being men of experience and skill therein, would or would not have come to the same conclusion as the defendant." Opinion of Tindal, C.J.

The solicitor would, of course, be liable if he omitted to require the statutory searches to be made. And in the case of counsel advising a search for specified incumbrances, it is laid down in the above-cited learned treatise that the "solicitor need not make a more extensive search;" though the generality of the proposition is guarded by the reservation, "unless aware of some particular reason for so doing."⁴ A further reservation may be suggested—that the duty of the solicitor would be dependent to no small extent on the form of the opinion. Statutory searches.

Prima facie, the solicitor is bound to inquire as to the payment of the past rent. If, however, the client has made inquiries about the matter, and leads his solicitor to believe that he is satisfied about it, the marginal note in *Warne v. Kempster*⁵ states that it is not negligence in the solicitor to omit to call for the receipts, or take other precautions which otherwise would be usual and necessary. Yet this does not appear from the report of what Blackburn, J., said; from which the inference rather seems to be that, failing an *employment* "to see whether the transaction was safe with the reference to the past rent," there would be no presumption raised whatever. Duty to inquire as to payment of past rent.

In cases in which a deed is settled in chambers there is the authority of Kay, J.,⁶ for saying that the solicitor may be liable for negligence even though the deed professes to be settled by the Court. "The Court," says that learned judge, "acts always Solicitor may be liable where deed professes to be settled by the Court.

¹ 1 Byth. & Jarm. Conv. (4th ed.), 100; *Watts v. Porter*, 3 E. & B. 743; *Cooper v. Stephenson*, 21 L. J. Q. B. 292; *Allen v. Clark*, 7 L. T. (N. S.) 781.

² *Dart, Vendors and Purchasers* (6th ed.), vol. i. 523.

³ *Chapman v. Walton*, 10 Bing. 57, at 63.

⁴ *Dart, Vendors and Purchasers* (6th ed.), vol. i. 523, citing *Cooper v. Stephenson*, 21 L. J. Q. B. 292. ⁵ 1 F. & F. 695.

⁶ *Stanford v. Roberts*, 26 Ch. D. 155, at 160. As to the duty of the client to examine bundle of deeds handed him by his solicitor, *Hunt v. Elmes*, 2 De G. F. & J. 578.

upon the instigation of the solicitors employed in the matter, and suppose that by reason of the exceeding negligence of the solicitor employed by the plaintiff in the action, a deed of settlement should be settled and passed in a form which omitted some of the provisions which the conveyancing counsel had recommended should be inserted in it, is it to be said that the solicitor is relieved from responsibility? I do not think so. There are many cases in which a solicitor would not be relieved from responsibility, although the deed was formally settled in Court, if the deed happened to be in a wrong form owing to his negligence."¹

(2) Landlord and tenant.

(2) In the course of business between landlord and tenant.

The intervention of a solicitor is most often required in this case in the preparation of leases, a duty not infrequently complicated by the existence of settlements or special conditions. The lease and counterpart are usually prepared by the solicitor of the lessor on behalf of both parties. The costs of surveyor's charges and counsel's fees for advising on title will not be allowed as part of the costs of the lease.² Leases should contain all the proper and usual covenants applicable to the subject-matter demised, the custom of the country, and the most usual and probable contingencies.³

Usual covenants.

"Usual covenants," says Jessel, M.R., in *Hampshire v. Wickens*,⁴ "may vary in different generations. The law declares what are usual covenants according to the then knowledge of mankind." These, whether the agreement in terms stipulates for them or not, should be inserted.⁵ Though in *Hampshire v. Wickens* the way in which the case came before the Court left the judge to decide what were usual covenants, in an action for negligence the matter would have to be left to the jury on the question of what is reasonable and competent skill; though the jury would have to decide under the direction of the judge.

(3) Lenders and borrowers.

(3) In the course of negotiating between lenders and borrowers.

The duty of a solicitor in the case of negotiating a loan may fall under any one of the three following classes:—

¹ As to the vendor's duty to the purchaser in regard to deterioration of the property see *Phillips v. Silvester*, L. R. 8 Ch. 173; *Clarke v. Ramuz*, (1891) 2 Q. B. 456.

² *Lock v. Furze*, 19 C. B. N. S. 96 per Erle, C.J., at 119. See Woodfall, *Landlord and Tenant* (15th ed.), 206.

³ *Palling*, *Attorneys* (3rd ed.), 234. *Stannard v. Ullithorne*, 10 Bing. 491. In *Barrow v. Isaacs and Son* (1891), 1 Q. B. 417, there was provision in a lease that the lessees should not grant an underlease without the lessor's consent in writing being obtained. The lessees underlet part of the premises without asking for the lessor's consent. The underlease was prepared by the solicitor, who omitted to look at the head lease, and forgot that it contained the covenant, not to underlease without consent. It was held by the Court of Appeal that the negligence was not a mistake so as to make applicable the plea of equity, and that the court would not relieve from the forfeiture.

⁴ 7 Ch. D. 555, at 561; *In re Lander and Bagley's Contract* (1892), 3 Ch. 41. Cp. *James v. Couchman*, 29 Ch. D. 212.

⁵ *Church v. Brown*, 15 Ves. at 265; *Probert v. Parker*, 3 My. & K. 280.

a. He may receive a certain sum of money to invest in a particular security. *a.* Duty to invest in a particular security.

In this case all he does is the legal business. He receives the money, and has to see that the deeds are executed in proper time, and that the money is handed over to the borrower. He has no duty to inquire into the borrower's responsibility, nor into the sufficiency of the security¹ arising from the property being unencumbered or the borrower being insolvent.²

β. He may receive money in order that he may find a security to invest it upon, subject to the approval of his client, retaining the money in the meantime. *β.* Duty to find a security subject to the approval of his client.

In this case he must submit to his client the various securities proposed, advise on their eligibility, and ultimately see that the money is handed over, and a sufficient security given for it. He is not liable where the matter does not require the exercise of professional skill and the reasons for taking any step are submitted to the client, and are of a nature that any man should be able to form an opinion upon.³

Where the client is a trustee the solicitor's duty is to call his attention "to the rules laid down by the Court for the guidance of trustees," and any matters known to him which materially affect the value of the property as a security.⁴ But he may also recommend the investment, when his responsibility is increased, as is well shewn in a Scotch case.⁵ "For an agent," says Lord President Robertson,⁶ "to bring an investment under the notice of a client is of course to a certain extent a recommendation, —that is to say, it is the expression of the opinion that the investment is worthy of consideration. If besides thus introducing an investment an agent expresses a favourable opinion of it, he will be liable, if his opinion was either not honest or given when he had no adequate information entitling him to give an opinion at all. But then it is necessary to bear in mind that all this has to be considered in relation to the client in question, and

When client is a trustee.

¹ 2 Chitty, Pleading, 281, n.; *Green v. Dixon*, 1 Jur. 137; *Howell v. Young*, 5 B. & C. 259.

² *Dartnell v. Howard*, 4 B. & C. 345. Cp. *King v. Withers*, Prec. Ch. 19. The marginal note is: "A scrivener who was employed to examine into a title fails in his duty by neglecting to make a thorough inquiry;" but the facts shew that Withers, the defendant, proposed the security to the plaintiff. On advising as to title, counsel suggested an inquiry, which Withers either never made, or "at least never gave any answer to the counsel, but told Sir Edward [the plaintiff] that Billingsly [the proposed lender] was a very honest man." In *Brinsden v. Williams* (1894) 3 Ch. 185, solicitors of a mortgagee trustee were held not liable for the insufficiency of the security, though the mortgage money was paid through them.

³ *Chapman v. Chapman*, L. R. 9 Eq. 276, at 296.

⁴ *Morgan v. Blyth* (1891), 1 Ch. 344, at 361, the case of an improper investment. *Sawyer v. Goodwin*, 1 Ch. D. 351.

⁵ *Cleland v. Brownlie*, 20 Rettie 152.

⁶ *L. c.*, at 162.

to the kind of investment he is known to desire." "In order," says Lord M'Laren,¹ "to make good a case of liability in such circumstances as the present, it appears to me that the pursuer must establish three points. He must shew, first, that the agent in the transaction undertook to act, not as a conveyancer, but as a valuator and adviser as to the sufficiency of the investment; second, that he gave bad advice either intentionally or without any sufficient reason for giving the advice; and third, that the information given by the agent was not in fact true information."

γ. Duty to invest without reference to his client.

γ. He may receive money to invest, and be empowered to act exclusively and without reference to his client, as if the client is abroad.²

In this case the solicitor has not merely to provide the securities, and conduct the legal business with reference to the settlement of the terms of the loan; he also undertakes the responsibility to his client of seeing that they are good securities, on which money may be safely invested.³ He becomes liable for the neglect of any precaution which a prudent man of competent skill would have taken—as for omitting to inquire if the proposing borrower has been bankrupt, or if any other circumstance of the case renders the security ineligible.⁴ In no case does it appear that he has to caution his client against improbable contingencies of loss;⁵ and the taking a mortgage without a power of sale has in an old case been held a precaution against so improbable a contingency of loss, that default in taking it should not affect a solicitor with liability for negligence.⁶

Blair v. Bromley.

In *Blair v. Bromley*⁷ it was contended not to be within the ordinary duty of a solicitor to receive money to lay out on mortgage for his clients. Lord Lyndhurst, however, overruled this, "for the duty of laying out the money was in the ordinary course of the business of the firm; and they had undertaken it [to lay out money]; and in that case I agree with what is laid down by the Master of the Rolls in *Sadler v. Lee*,⁸ that all the partners become liable for the several acts of each";⁹ and thus

¹ *L. c.*, at 163.

² *Bostock v. Floyer*, L. R. 1 Eq. 26 (recognised in *Speight v. Gaunt*, 9 App. Cas. 1, at 5), denies the competence of trustees to trust so far to solicitors. See, however, the gloss by Lindley, L.J., 22 Ch. Div. 727, at 761.

³ *Dooby v. Watson*, 39 Ch. D. 178.

⁴ *Cooper v. Stephenson*, 21 L. J. Q. B. 292; *Smith v. Pocock*, 23 L. J. Ch. 545.

⁵ *Brumbridge v. Massey*, 28 L. J. Ex. 59.

⁶ *Bailey v. Abraham*, 14 L. T. (O. S.), 219; *Davidson, Conveyancing* (4th ed.), vol. ii. part ii. 85.

⁷ 5 Hare 542, 2 Ph. 354.

⁸ 6 Beav. 330.

⁹ See *Dundonald v. Masterman*, L. R. 7 Eq. 504, where James, V.C., considers and explains the expressions of Turner, L.J., in *Viney v. Chaplain*, 2 De G. & J. 468. Lord Campbell's remarks in *Harman v. Johnson*, 2 E. & B. 61, at 65, distinguish between the business of an attorney and a scrivener, while admitting that "attorneys frequently do act as scriveners in the full sense of the term;" and during the forty years since Lord

where a fraud was perpetrated by the solicitor's partner, the solicitor would himself be liable to make restitution.¹ In *St. Aubyn v. Smart*,² Malins, V.C., lays down that, though the ordinary course of business might not warrant any particular transaction, still a liability upon it would arise, binding all the members, so soon as it is shewn that any duty has in fact been undertaken by the firm, quite apart from the question whether the duty is within the ordinary course of a solicitor's business; for thereby all and each of the partners becomes liable for any miscarriage in the discharge of that duty.

It may be remarked that a liability of this sort does not strictly arise out of the partnership relation, but is rather a consequence of an estoppel to deny that the particular business undertaken is firm business, because the members of the firm have chosen to conduct themselves on the assumption that it is. *St. Aubyn v. Smart* is a decision rather illustrating the class of facts the presence of which will affect an innocent partner with liability for transactions not normally within the scope of the partnership, than as the indication of a principle that a partner may constructively be bound for acts of his partner outside the ordinary course of business and carried on independently of him.³

A solicitor's liability is that of any other agent similarly employed;⁴ although the circumstances of his employment may affect him with all the liability of a trustee.⁵

The solicitor for the lender not infrequently acts for the borrower as well. Where this is the case a duty of great delicacy is cast upon the solicitor. The double relation may be constituted not merely by actual retainer, but by inference from course of conduct. In this latter view the decision is for a jury. Yet whatever the means of constituting the relation—whether by actual agreement or by implication—when it is constituted the agent is responsible to either of the parties who may suffer from his negligence in preparing the security.⁶

Where the solicitor acts for the borrower his duty is the converse of that when he acts for the lender.

Campbell's *dictum* this frequency has probably grown into a custom judicially to be noticed. As to the evidence sufficient to establish this, see *Ex parte Powell*, 1 Ch. Div. 501, at 507; *Crawcour v. Salter*, 18 Ch. Div. 30; *Ex parte Turquand, In re Parker*, 14 Q. B. Div. 636. As to the business of a scrivener, see *Ex parte Malkin*, 1 Rose 406, 2 Rose 27; *Adams v. Malkin*, 3 Camp. 534; *Wilkinson v. Candlish*, 5 Ex. 91, at 95; Vin. Abr. Scrivener.

¹ *Sadler v. Lee*, 6 Beav. 324, at 330.

² L. R. 5 Eq. 183, at 187, L. R. 3 Ch. 646.

³ This appears more clearly in the report of the case on appeal, L. R. 3 Ch. 646.

⁴ *Donaldson v. Haldane*, 7 Cl. & F. 762; *Hayne v. Rhodes*, 8 Q. B. 342.

⁵ *Dartnell v. Howard*, 4 B. & C. 345; *Craig v. Watson*, 8 Beav. 427.

⁶ *Lang v. Struthers*, 2 Wils. & Shaw. (H. L. Sc.) 563; *Robertson v. Fleming*, 4 Macq. (H. L. Sc.) 167.

(4) Partner-
ship matters.

(4) In Partnership matters.

In drawing up partnership deeds and advising on matters arising out of partnership transactions, the same duty is owing as in matters we have before discussed at large.

(5) Principal
and Surety.

(5) In matters affecting the relation of Principal and Surety.

In addition to the duties before set out, the solicitor must see that the contract of guarantee or indemnity is in writing,¹ and if not under seal is for a lawful consideration.²

(6) Debtor and
Creditor.

(6) In arrangements between Debtor and Creditor.

These may be either under ordinary retainers, when the principles regulating work done under retainer apply; or under arrangements between debtors and the general body of their creditors, when the provisions of the Bankruptcy Act define what are the duties of solicitors.³

(7) Matters
Matrimonial
and Testa-
mentary.

(7) In matters Matrimonial and Testamentary.

Shortly, it may be said that the extreme confidence bestowed in these matters imposes a greater obligation of care and circumspection on the solicitor, though there seems no difference of principle involved from those relations we have already considered.

Custody of
client's deeds

In the course of any or all of these relations the solicitor may have the custody of his client's deeds. Since he is bound by his position in relation to his client "to use ordinary care that it" (any deed of his client's) "should be forthcoming when wanted," he is *prima facie* liable if he fail to do this. The matter, however, is not peculiar to the relation of solicitor and client, and may be referred to its proper head of the general law of bailments.⁴

Solicitor
making client's
will in his own
favour.

If a solicitor, or indeed if any person, prepares a will with a legacy to himself, the law looks on it as a suspicious circumstance, of more or less weight according to the facts of each particular case, and as demanding the vigilant care of the Court in investigating the case, and calling upon it not to grant probate

¹ 29 Car. II. c. 3, s. 4; 19 & 20 Vict. c. 97, s. 2.

² *Goodman v. Chase*, 1 B. & Ald. 297. For the law affecting Principal and Surety see *De Colyar, Guarantees* (2nd ed.); *Rees v. Berrington*, 2 White and Tudor, L. C. in Equity (6th ed.), 1106, and notes 1111-1146; *Mayor &c. of Kingston-upon-Hull v. Harding* (1892), 2 Q. B. 494.

³ 46 & 47 Vict. c. 52. In *Luddy's Trustee v. Peard*, 33 Ch. D. 500, it was laid down "that the obligations on a solicitor dealing with his client extend to the case of a dealing between a solicitor and the trustee in bankruptcy of his client." For the law where a former confidential legal adviser bought up charges on his former employer's estate, see *Carter v. Palmer*, 8 Cl. & F. 657, per Lord Cottenham at 705.

⁴ *Reeve v. Palmer*, 5 C. B. N. S. 84; *Wilmot v. Elkington*, 2 L. J. (N. S.) K. B. 103; *Wilkinson v. Verity*, L. R. 6 C. P. 206. *Ante*, 892 *et seqq.* Where a solicitor deposits deeds without his client's knowledge as security for an advance to the client, he is liable for having *mislaid* them: *North-Western Railway Company v. Sharp*, 10 Ex. 451; the papers of the client must be delivered up in a reasonable state of order: *In re Thomson*, 20 Beav. 545.

without full satisfaction that the instrument did express the real intentions of the deceased.¹

"An attorney," says Lord Cairns,² "is not affected by the absolute disability to purchase which attaches to a trustee. But for manifest reasons, if he becomes the buyer of his client's property, he does so at his peril. He must be prepared to shew that he has acted with the completest faithfulness and fairness; that his advice has been free from all taint of self-interest; that he has not misrepresented anything, or concealed anything; that he has given an adequate price, and that his client has had the advantage of the best professional assistance which, if he had been engaged in a transaction with a third party, he could possibly have afforded. And although all these conditions have been fulfilled, though there has been the fullest information, the most disinterested counsel and the fairest price, if the purchase be made covertly in the name of another, without communication of the fact to the vendor, the law condemns and invalidates it utterly. There must be *uberrima fides* between the attorney and the client, and no conflict of duty and interest can be allowed to exist."³

Lord Cairns's
statement of
the law.

Property of a client held by a solicitor as trustee does not vest in the trustee in bankruptcy,⁴ and is not within the reputed ownership clause.⁵ A solicitor must not mix it with his own property, though in any case it can be followed by the client so long as it can be traced.⁶ Moreover, it appears settled that where a solicitor has had money from his client for the purpose of investing on a mortgage of specified property, and has taken the security in his own name, he will be held to be a trustee of the security for his client to the extent of the sum received from him even though the solicitor may have made a deposit of the title-deeds with his banker or other person,⁷ and the client is not guilty of negligence in omitting to get his title-deeds from his solicitor who afterwards is found to have dealt with them on his own account.⁸

Property of
client held by
solicitor.

With regard to bills of sale, the duties of solicitors are pre-Bills of sale.
scribed by the Bills of Sale Acts.⁹

¹ *Barry v. Butlin*, 2 Moo. P. C. C. 480; *Fulton v. Andrew*, L. R. 7 H. L. 448.

² *M'Pherson v. Watt*, 3 App. Cas. 254, at 266.

³ See also per Blackburn, J., *l. c.*, at 270.

⁴ 46 & 47 Vict. c. 52, sec. 44, sub-sec. 1.

⁵ Sub-sec. 2 (iii.).

⁶ *Dickson v. Murray*, 31 Sol. Jour. 493; *Cordery, Solicitors* (2nd ed.), 125.

⁷ *Harpham v. Shacklock*, 19 Ch. D. 207; cp. what is said by Lord Herschell, *Taylor v. Russell* (1892), App. Cas. 244, at 253; *In re Richards*, 45 Ch. D. 589.

⁸ *In re Vernon Ewens & Co.* 33 Ch. D. 402.

⁹ 41 & 42 Vict. c. 31 sec. 10; 45 & 46 Vict. c. 43. As to inadvertence in renewing registration of a bill of sale, *In re Parsons, Ex parte Furber* (1893), 2 Q. B. 122.

In *Ex parte* National Mercantile Bank, *In re* Haynes,¹ it was laid down that a solicitor, who stated in the attestation clause to a bill of sale that he had explained the effect of the bill to the grantor when he had not done so, was liable both to an action by his client and also to penal proceedings.

Where a solicitor took a charge from a company for his costs, which charge was not registered, the Court of Appeal affirmed the Master of the Rolls in holding that the solicitor could not take advantage of the charge, as it was his duty to see that the register was properly kept.²

Personal
liability to
third person.

The personal liability of a solicitor to third persons is best summarized by quoting the words of Lord Abinger, C.B., in *Robins v. Bridge*:³ "The attorney is known merely as the agent—the attorney of the principal, and is directed by the principal himself. The agent, acting for and on the part of the principal, does not bind himself, unless he offers to do so by express words; he does not make himself liable for anything, unless it is for those charges which he is himself bound to pay, and for which he makes a charge."⁴

Agent in town
and client in
the country.

Further, the general rule is, that there is no privity between the agent in town and the client in the country; the former cannot maintain an action against the latter for his fees, nor the latter against the former for negligence. Something therefore is necessary beyond the mere relation of the parties to each other to make the agent in town liable to the client.⁵ In *Moody v. Spencer*⁶ the town agent was indeed held liable to account to the country client for money he had received; but there the money was received in the course of the suit from the opposite party, and since it could not be said that the agent received it to the use of the country attorney, and as clearly it was not received on the agent's own account, of necessity it was treated as held to the use of the client.⁷

Solicitor may
not derive an
advantage at
the expense of
his client out
of his client's
business.

A solicitor can be allowed to do no act in the absence of his client, and without his consent, by which he may derive an advantage at the expense of his client;⁸ and though no doubt a

¹ 15 Ch. Div. 42, per James, L.J., at 52. As to how this duty should be performed, see per Hannen, J. *Morrell v. Morrell*, 7 F. D. 68, at 70.

² *In re* Patent Bread Machine Company, *Ex parte* Valpy and Chaplin, L. R. 7 Ch. 289.

³ 3 M. & W. 114.
⁴ See *Parrot v. Wells*, 2 Vern. 127; *Saxon v. Blake*, 29 Beav. 438; *Clark v. Lord Rivers*, L. R. 5 Eq. 91.

⁵ *Cobb v. Becke*, 6 Q. B. 930, at 935.

⁶ 2 Dow. & Ry. 6.

⁷ As to solicitor's lien generally, *In re* Taylor, *Stileman v. Underwood* (1891), 1 Ch. 590. As to solicitor's lien on deeds of his client, see the judgment of Lord Chancellor Sugden, *Blunden v. Desart*, 2 Con. & Law. (Ir. Ch.) 111, at 120.

⁸ *Stockton v. Ford*, 11 How. (U. S.) 232, at 247. See *Marsh v. Whitmore*, 21 Wall. (U. S.) 178, for what constitutes ratification.

principal may ratify or adopt the act of his agent—for it is to the rules governing the relationship between principal and agent that the determination of this point is to be referred—in purchasing that which such agent has been employed to sell, or in taking to himself any other advantage from property he has to deal with; yet “before the principal can properly be said to have ratified or adopted the act of his agent or waived his right of complaint in respect of such acts, it should be shewn that he has had full knowledge of its nature and circumstances; in other words, that he has had presented to his mind proper materials upon which to exercise his power of election, and it by no means follows that because” “he does not repudiate the whole transaction after it has been completed, he has lost a right actually vested in him to the profits derived by his agent from it.”¹

BARRISTERS.

The duty of a barrister to his client may conveniently be noticed in this place, and in connection with the duties of solicitors; though a barrister is not, like a solicitor, an officer of the Court.

The relation between barrister and client in England is an *Roman practice*.² For a considerable period of Roman history the conduct of suits was monopolized by the patricians, whose services were at first altogether *gratuitous*, or rather were requited *exclusively* by political support. The patron is described as walking in the forum for the convenience of suitors, who addressed him with *licet consulere, quære an existimes; id jus est necne*; and on getting the reply, *consule*, put the case, and were answered in the formula, *Secundum ea quæ proponuntur, existimo, placet, puto*.

When the connection between client and patron ceased, and the patron had no longer a claim on the services of the client, the practice arose of bringing an *honorarium* in lieu of a pay-

¹ De Bussche v. Alt, 8 Ch. Div. 286, at 313.

² For an historical sketch of the office and functions of the advocate, see Forsyth, Hortensius 94. Smith, Dictionary of Greek and Roman Antiquities (3rd ed.), arts. “*Advocati*,” and “*Jurisconsulti*.” Colquhoun, Roman Civil Law, §§ 499, 500, 2009, 2209. Domat, Public Law, Bk. 2, tit. 6, sec. 2, is concerned with the duties of advocates. To art. 5 (Strahan’s ed.) there is a copious citation of authorities for the proposition that advocates “should embrace their functions upon other views than that of gain.” The rights and duties of an advocate of the French bar are treated, Jones, History of the French Bar, 177. There is a note to Horne Tooke’s Case, 20 How. St. Tr. 651, at 687, containing information as to the powers of the Inns of Court concerning admission to the bar. See further, *Lettres sur la Profession d’Avocat*, par Camus; *Profession d’Avocat*, par Dupin; and *Histoire du Barreau de Paris depuis son Origine jusqu’à 1830*, par Gaudry. Reference may also be made to Savigny, History of the Roman Law during the Middle Ages (Cathcart’s translation), c. 6, State of Law Education during the Early Part of the Middle Ages.

ment by support and services. Throughout the whole growth of the civil law, from the foundation of Rome to the time of the Digest of Justinian, not only was the advocate always under legal incapacity to make a contract for his remuneration, but also, throughout a part of that time, he was under prohibition of receiving any gain for his services.¹

Fees limited
at Rome.

Though the advocate received no money for his assistance in the earliest times, yet in a later stage of the history of the city such extravagant sums were given him that they occasioned the enacting of the *Lex Cincia de donis et muneribus ne quis ea ob causam orandam peteret*, A.U.C. 550.² The prohibition of this law having fallen into neglect, was revived by Augustus,³ with an additional clause by which the advocate who pleaded for hire was condemned to pay four times the sum he was to receive.⁴ Later on, the Emperor Claudius relaxed this severity, and by a decree fixed the maximum which an advocate might lawfully receive by way of gift at £80, making him liable to refund if he took more.⁵

¹ Per Erle, C.J., *Kennedy v. Broun*, 13 C. B. N. S. 677, at 732. The tone of Roman sentiment may be illustrated by a quotation from Ovid, who in *Amores*, Bk. i. Elegia x., *Ad puellam, ne pro amore premia poscat*, regards the accepting money for advocacy as a like baseness:

*Turpe, reos empti miseros defendere lingua;
Quod faciat magnas, turpe, tribunal opes.*

An et philosophi professorum numero sint? Et non putem; non, quia non religiosa res est; sed quia hoc primum profiteri eos oportet, mercenariam operam spernere. Proinde ne juris quidem civilis professoribus jus dicent; est quidem res sanctissima civilis sapientia; sed quæ pretio nummario non sit aestimanda nec dehonestanda, dum in iudicio honor petitur qui in ingressu sacramenti efferri debuit. Quædam enim tametsi honeste accipiantur inhoneste tamen petuntur: D. 50, 13, 1, §§ 4, 5. Among the Greeks the same feeling was very strong, Xenoph. Memor. i, 6, 13. Plato thought it unworthy of a virtuous man to accept a salary for the discharge of any public duty Repub. i. 347. See, too, Gorgias, 347, Sophistes, 223, 224, 225, 226, 231; Symp. 217, 218; Theæt. 165. The reference to Plato are to Stallbaum's edition. The history of the honorarium is given by M. Grellet-Dumazeau in his work *Le Barreau Romain*, 97, Des Honoraires; also by Forsyth, Hortensius, c. 9, The Honorarium, 64. *Ante*, 922 n^o.

² Smith, Dictionary of Greek and Roman Antiquities (3rd ed.), art. "*Lex Cincia*."

³ A.U.C. 732.

⁴ Murphy, (Tacitus Annal. xi. c. 5, note. *Multaque arbitrio senatus constituta sunt: Ne quis ad causam orandam mercede aut donis emeretur* (Tacitus, Annal. xiii. c. 5).

⁵ *Capiendis pecuniis posuit modum usque ad dena sester tia, quem agressi repetundarum tenerentur* (Tacitus Annal. xi. 7). Tacitus gives the arguments used on both sides in the debate before Claudius, which resulted in the limited liberty being allowed. Annal. xi. 5, 6, 7. In the Code (§ 1, C. 3, 1, 14), the duties of the counsel are thus indicated: *Patroni autem causarum qui utrique parti suum præstantes auxilium ingrediuntur, quum his fuerit contestata, post narrationem propositam et contradictionem objectam . . . sacrosanctis evangelis tactis iuramentum præstent, quod omni quidem virtute sua omnique ope, quod verum et justum existimaverint, clientibus suis inferre procurabunt; nihil studii relinquentes quod sibi possibile est; non autem, credita sibi causa cognita, quod improba sit, vel penitus desperata et ex mendacibus allegationibus composita, ipsi scientes prudentesque mala conscientia liti patrocinabuntur, sed et si certamine procedente aliquid tale sibi cognitum fuerit, a causa recedent ab hujusmodi communione sese penitus separantes.* See also D. 19, 2, 38, § 1. With this compare *Turner v. Phillips*, Peake (N. P.) 123. A well-known passage on the relations between counsel and client is found in Cicero's oration, *Pro Roscio Amerino*, c. 11. See also *De Oratore*, 1, 45. The English theory was eloquently

Dr. Wharton¹ points out that the *honorarium* could be recovered through a *cognitio extraordinaria* of the *Præses*. Erle, C.J.,² objects to this, that the sections of the Digest³ vouched for this view prove no more than that an advocate could be made to refund so much of a fee already paid as exceeded the legitimate amount under the decrees of the Emperor Claudius; further, he indicates how this amount was to be ascertained; and draws a distinction between a promise of remuneration during the pendency of litigation which does not bind, and a security given after the suit is at an end, which is enforceable, if, that is, it do not exceed the legitimate amount.

In what cases the *honorarium* was recoverable.

In the Middle Ages, by the reduction of legal proceedings to writing, the ancient methods were superseded in the heart of the empire; oral proceedings, however, seem to have been retained in what were the barbarous provinces; so that the practice of the law in England in the Middle Ages came nearer the procedure of ancient Rome than that in use in Rome itself.⁴

Practice in the Middle Ages.

In English law, according to Erle, C.J., there does not seem any trace of the limit imposed by the decree of the Emperor Claudius; and he adds that in all the records of our law from the earliest time till now there is no trace that an advocate has ever maintained a suit against his client for his fees in litigation, or a client against an advocate for breach of a contract to advocate.⁵

But this is considerably overstating the facts. For instance, in Y. B. 14 H. VI. 18, pl. 58, Paston, J., says, addressing counsel before him, and with the concurrence of Juyn, C.J., "if you, who are sergeant at law, undertake my cause and do nothing, or conduct it in such a manner that I have cause to charge you with losing it, I have an action on the case against you." Again, in Y. B. 37 H. VI. 8, pl. 18, it is said by Prisot, C.J., "if one were retained to be counsel for a certain sum, he might have an action for the money

expressed by Cockburn, C.J., at the bar dinner in the Middle Temple Hall to M. Berryer, reported in the Times newspaper 9th November, 1864: "The arms which an advocate wields he ought to use as a warrior and not as an assassin. He ought to uphold the interests of his clients *per fas* but not *per nefas*. He ought to know how to reconcile the interests of his clients with the eternal interests of truth and justice." There is "a preface dedicatorie" to Sir John Davys's Reports well worth referring to on the same subject. See also an article in Edin. Rev., vol. lxiv., 155, Rights and Duties of Advocates, and one in Lond. and Westm. Rev., vol. xxxv., Licence of Counsel.

¹ Negligence (2nd ed.), §§ 486, 719.

² Kennedy v. Broun, 13 C. B. N. S. 677, at 735. It is noteworthy that in Mr. Kennedy's argument in this case, D. 50, 13, 4, is not cited: *Divus Antoninus Pius rescripsit; juris studiosos, qui salaria petant, hæc exigere posse*. See the explanation of this text in Moyle, Introduction to Justinian, Institutes (2nd ed.), 60.

³ D. 50, 13, 1, §§ 10, 12.

⁴ Colquhoun, Roman Civil Law, § 501.

⁵ Kennedy v. Broun, 13 C. B. N. S. 677, at 727; 3 Bl. Comm. 28.

though the other might have had no advice"; and this statement is repeated in Comyns's Digest¹ as if it were law.² In 5 Car. I., however, there is the following: "The plaintiff being a counsellor at law, brought his bill for fees due to him from the defendant, being a solicitor, and was to account with him at the end of every term. The defendant demurs. This Court allowed demurrer *nisi causa*. Demurrer affirmed, and the bill dismissed."³

Theory of the English law.

The theory of the English law seems rather to be that it is of advantage for counsel to be paid "those emoluments, which produce integrity and independence;"⁴ but that "counsel should be rendered independent of the event of the cause, in order that no temptation may induce them to endeavour to get a verdict, which in their consciences they think they are not entitled to. Counsel should be rendered as independent as the judge or jury who try the cause, when called upon to do their duty."⁵ That this admirable provision of the law was not altogether at all times effectual for its object, may be concluded from the necessity of the Statute of Westminster the First, c. 29, and from Sir Edward Coke's comments upon it.⁶

Distinction between undertakings concerning advocacy in litigation and contracts in cases unconnected with advocacy.

A distinction has, however, been drawn between undertakings concerning advocacy in litigation⁷ and contracts in cases uncon-

¹ Y. B. 37 H. VI., 8, pl. 18, cited, Reeves, Hist. of the Eng. Law (2nd ed.), vol. iii. 372; see also 404, where Y. B. 21 H. IV., pl. 6, is referred to.

² Dett. (A 8). See also a note to Fitzherbert, *De Natura Brevium*, *Trespass sur le case*, 94 E., note, citing Y. B. 11 H. VI., 24, 55. There is an Irish case, *Hobart v. Butler* (1859), 9 Ir. C. L. R. 157, holding that fees are recoverable by express contract. It was seriously doubted in the *Queen v. Doutre*, 9 App. Cas. 745, at 751, whether *Kennedy v. Broun* was an authority in English colonies, where a lawyer is "not a mere advocate or pleader," but "combines in his own person the various functions which are exercised by legal practitioners of every class in England." In that case the Judicial Committee was "not prepared to accept all the reasons which were assigned for that decision in the judgment of Erle, C.J." See also *Vin. Abr. Counsellor*.

³ *Moor contra Row*, 1 Rep. in Chancery, 21. In America the different position of an "attorney at law" from that of a barrister in England has occasioned the adoption of a rule admitting the legal enforceability of agreements to prosecute a claim, either at a fixed compensation or for a reasonable percentage upon the amount recovered, *Wright v. Tebbitts*, 91 U. S. (1 Otto) 252. See the account of the practice as to counsel's fees by Bradley, J., *In re Paschal*, 10 Wall. (U. S.) 483, at 494. Cp. *Trist v. Child*, 21 Wall. (U. S.) 441; *Stanton v. Embrey*, 93 U. S. (3 Otto), 548; *Mooney v. Lloyd*, 5 Ser. & Rawle (Pa.) 412.

⁴ *Morris v. Hunt*, 1 Chit. (K. B.) 544, per Bayley, J., at 551. The learned judge adds: "It is their duty to take care, if they have fees, that they have them beforehand."

⁵ Per Best, J., *l. c.* at 554. Cp. some declamation by Erle, C.J., *Kennedy v. Broun*, 13 C. B. N. S. 677, at 738, beginning, "Such is the system." The considerations arising from the employment being one into which tact and judgment so largely enter, that it could not be submitted to the test of an action at law without destroying its character, seem so obvious and commonplace as not to require or merit treatment in a style of stilted rhetoric that only obscures their import. See an anecdote in Lord Campbell's *Life of Lord Eldon*, *Lives of the Chancellors*, vol. vii., 52: "I was counsel for a highwayman," &c.

⁶ 2 Co. Inst. 213. A whole mine of learning on the position, and various degrees of English legal practitioners is contained in Sergeant Manning's book, *Serviens ad legem, As to Sergeants*. See further the preface to 10 Co. Rep. xxxv.; Pulling, *Order of the Coif*; and Crabb, *Hist. of Eng. Law*, 182.

⁷ That is, not merely business in court, but business relating to business that may

nected with advocacy. These latter are not regarded as within the rule disentitling counsel to sue in respect of contracts made regarding them;¹ consequently the ordinary rules as to liability for negligence apply. As to the former, there is an absolute incapacity to make a contract of hiring as an advocate;² for it is of the essence of the employment of an advocate at the English bar, accepting a brief in the usual way, that he undertakes a duty, but does not enter into any contract or promise, express or implied.³ If, however, he intentionally does a wrong, and acts with malice, fraud, or treachery, his action may be treated as unauthorized and ineffectual. "For instance," says Pollock, C.B.,⁴ "we think in an action for a nuisance between the owners of adjoining land—however desirable it may be that litigation should cease by one of the parties purchasing the property of the other—we think the counsel have no authority to agree to such a sale and bind the parties to the suit without their consent, and certainly not contrary to their instructions, and we think such an agreement would be void."

The conduct and control of causes are necessarily left to counsel; and the apparent authority with which they are clothed is to do everything which in the exercise of their discretion they may think best for the interests of their clients, and if within the limits of this apparent authority they enter into agreements with opposite counsel as to the causes in which they are engaged, such agreements are held binding.⁵ If a party desires to keep the power of directing counsel in the conduct of the suit, he must agree with some counsel willing so to bind himself, else it will be presumed that counsel has power to act in everything within the scope of the action.

A counsel accordingly is not liable to an action for any proceedings in the course of an action, as for calling or not calling a particular witness,⁶ or for putting or not putting a particular question, or for honestly taking a view of the case which may turn out to be quite erroneous.⁷ He is not responsible for ignorance of law, or any mistake in fact, or for being less eloquent or less

Counsel have general control of action.

May enter into binding agreements for their clients in the conduct of the suit.

Counsel not responsible for his ignorance or lack of judgment.

come into court—*s.g.*, for negligently and unskilfully sealing and signing a bill in equity: *Fell v. Brown*, 2 Peake (N. P.) 96.

¹ *Mingay v. Hammond*, 2 Cro. (Jac.) 482; *Egan v. Guardians of the Kensington Union*, 3 Q. B. 935, n.; *Virany v. Warne*, 4 Esp. (N. P.) 46; *Hoggins v. Gordon*, 3 Q. B. 466; *Marsack v. Webber*, 6 H. & N. 1.

² See an article in 50 Law Times, 197, on Retainers and Retaining Fees, reprinted from the Canada Law Journal. As to the practice in accepting a retainer against a former client: *Earl of Cholmondeley v. Lord Clinton*, 19 Ves. 261.

³ *Swinfen v. Lord Chelmsford*, 5 H. & N. 890, at 920: "Cases may indeed occur where, on an express promise (if he made one), he would be liable in assumpsit."

⁴ *L. c.* at 922.

⁵ *Strauss v. Francis*, L. R. 1 Q. B. 379.

⁶ See *Hatch v. Lewis*, 2 F. & F. 467, at 477.

⁷ *Swinfen v. Lord Chelmsford*, 5 H. & N. 890.

astute than he was expected to be. He may even withdraw a juror contrary to his client's wishes,¹ unless the client's dissent is brought to the knowledge of the opposite party at the time;² and the client is bound by the representation he makes by counsel acting for him so long as the representation continues. Thus even a secret withdrawal of authority unknown to the other side does not affect his apparent authority. If, however, counsel conduct a cause in such a manner that an unjust advantage would be given to the other side, or if he act under a mistake in such a way as to work injustice, the Court could review his action.³

Opinion of
Pollock, C.B.,
in *Swinfen*
v. Lord
Chelmsford.

This view of the authority of counsel is substantially that of Pollock, C.B., in *Swinfen v. Lord Chelmsford*,⁴ in which, however, some members of his court did not concur. "If," says the learned Chief Baron, "in spite of instructions to the contrary, he [counsel] enters into a compromise, believing that it is the best course to take, and that the interest of his client requires it, this is but an indiscretion or an error in judgment if done honestly; and it appears to me that, neither for the one nor the other, can any action be maintained against him." "I am sure," says Lord Campbell in *Purves v. Landell*,⁵ "I should have been sorry when I had the honour of practising at the bar of England, if barristers had been liable to such a responsibility" [of guaranteeing the soundness of their advice]. "Though I was tolerably cautious in giving opinions, I have no doubt that I have repeatedly given erroneous opinions; and I think it was Mr. Justice Heath, who said that it was a very difficult thing for a gentleman at the bar to be called upon to give his opinion, because it was calling upon him to conjecture what twelve other persons would say upon some point that had never before been determined."⁶

Counsel not
liable
indirectly.

As counsel is not directly liable for negligence, so also he cannot be made indirectly liable by being sued for the recovery of his fee, even though he has not attended the hearing of the case, and apparently has done nothing for his money.⁷

This last feature of counsel's relation to his client is attributed by Dr. Clark Hare⁸ to the principle of the Roman law, in which system the doctrine of consideration did not prevail, and under

¹ *Strauss v. Francis*, L. R. 1 Q. B. 379.

² *Cp. Lowry v. Guilford*, 5 C. & P. 234.

³ *Matthews v. Munster*, 20 Q. B. D. 141.

⁴ 5 H. & N. 890, at 924.

⁵ 12 Cl. & F. 91, at 102.

⁶ I have heard the late Huddleston, B., express this somewhat differently, saying: "There is no such thing as being right in law. The House of Lords are only right, because there is no Court above them to overrule them."

⁷ *Turner v. Phillips, Peake* (N. P.) 122. As to misconduct of counsel, see note to *McDonald v. People*, 9 Am. St. R. 547, at 559-570; *In re Pollard*, L. R. 2 P. C. 106.

⁸ *Contracts* 87.

which either party to a contract was entitled to insist on the performance by the other of his part irrespective of default on his own part. But this view does not seem accurate, since neither by the Roman law nor by our own is the relation of counsel and solicitor a contractual one. In legal theory, the fee of counsel is a present, not a payment ; his services also, in theory, are not paid for, but gratuitous.



BOOK VII.
UNCLASSIFIED RELATIONS.



BOOK VII.

UNCLASSIFIED RELATIONS.

CHAPTER I.

PARTNERSHIP.

THE definition of Partnership in English law is now fixed by the Partnership Act, 1890,¹ as "the relation which subsists between persons carrying on a business² in common with a view of profit."

"Partnership," says Jessel, M.R.,³ in commenting upon the Definition. collection of definitions in Lindley on Partnership,⁴ "is undoubtedly a contract for the purpose of carrying on a commercial business—that is, a business bringing profit—and dividing the profit in some shape or other between the partners." Further, if there is an association of two or more persons formed to carry on a business who share between them the profits of the business, they are to be treated as partners unless there are surrounding circumstances to shew that they are not such.⁵

The principles governing the determination of the amount of negligence importing liability between partners are not very

¹ 53 & 54 Vict. c. 39, s. 1, sub-s. 1.

² By s. 45, "business" includes every trade, occupation, or profession. See Jessel, M.R.'s criticism by anticipation of this definition of partnership in *Pooley v. Driver*, 5 Ch. D. 458, at 473. See Pothier's definition, *Traité du Contrat de Société*, n. 1.

³ *Pooley v. Driver*, 5 Ch. D. 458, at 472. "There is in this agreement," says Field, J. (*Beauregard v. Case*, 91 U. S. (1 Otto) 134, at 140), "all the essential conditions for the creation of a partnership—provisions for a union of services and money, and a division of profits and losses." See for the general principles governing commercial partnerships, *Winship v. Bank of the United States*, 5 Peters (U. S.) 529. A partnership exists between two or more persons whenever there is such a relation between them "that each is as to all the others, in respect of some business, both principal and agent," *Morgan v. Farrel*, 58 Conn. 413, at 422, 18 Am. St. R. 282.

⁴ Vol. I. (3rd ed.), 2 and 3 (6th ed.), 11 and 12. In the 3rd edition the definition given by the author is "an agreement that something shall be attempted with a view to gain, and that the gain shall be shared by the parties to the agreement." See *Badely v. Consolidated Bank*, 34 Ch. D. 536, at 552, citing *Mollwo Marchand and Co. v. Court of Wards*, L. R. 4 P. O. 419, at 435.

⁵ *Pooley v. Driver*, 5 Ch. D. 458, at 474. As to right of action *inter se*, see *Parsons, Partnership* (2nd ed.), 288.

copiously illustrated by decided cases in English law. Hence the rules of the civil law must be our guide.¹

Principle of liability in the Civil law.

The general principle of liability is thus treated: *Socius socio etiam culpæ nomine tenetur, id est desidix, atque negligentix. Culpa autem non ad exactissimam diligentiam dirigenda est; sufficit etenim talem diligentiam communibus rebus adhibere, qualem suis rebus adhibere solet; quia qui parum diligentem sibi socium acquirit, de se queri debet.*² Or, as it is otherwise stated, the partner must shew "*diligentia quam suis rebus adhibere solet, or diligentia quam suis.*"

Case of partners an exception to the ordinary rule.

Partners, accordingly, are "not always obliged to use that middle kind of diligence which prudent men employ in their own affairs;"⁴ they are secure if they act in the partnership affairs as they would do in their own; so that if a partner fall into error in management from want of a larger share of prudence and skill than he was truly master of, he is not liable for the consequences; for the partners are themselves to blame in not making choice of an associate of greater abilities, and can recover only for the consequences of gross faults.⁵

Not responsible for *damna fatalia*.

It follows, even without specific authority, that partners are not responsible for what the Roman law calls *damna fatalia*⁶—accidents, as, for example, robbery or fire; but they are liable for thefts, as any other bailees would be.⁷ Where a partner is engaged in partnership business, and is thereby exposed to loss, he is entitled to recoupment from the partnership funds; and the opinion of Julian was generally accepted, that, if a partner sustained injury in defending the partnership goods, the partnership should pay the doctor's bill.⁸

These principles of the civil law, having their basis in universal jurisprudence, seem strictly applicable to English law, and have often been so applied.⁹

¹ D. 17, 2, Pro Socio. There are very full notes on the Civil Law in Moyle, Just. Inst. 3, 25. See Hunter, Roman Law (2nd ed.), 516-524.

² Dig. 17, 2, 72.

³ Wharton (2nd ed.), Negligence, § 54.

⁴ Erskine, Inst. 3, 3, 21.

⁵ *Utrum ergo tantum dolum, an etiam culpam præstare socium oporteat, queritur. Ei Celsus libro septimo digestorum ita scripsit: Socios inter se dolum et culpam præstare oportet. Si in cõfunda societate, inquit, artem operamve poleicitus est alter, veluti cum pecus in commune pascendum, aut agrum politori damus in commune querendis fructibus; nimirum ibi etiam præstanda est; pretium enim operæ artis est velamentum. Quod si rei communi socius nocuit, magis admittit culpam quoque venire:* Dig. 17, 2, 52, § 2. The extract from Ulpian in D. 13 6, 5, places the husband and partner in the same category with the vendor, vendee, hirer, letter, &c. This identity is adopted by Sir William Jones, but Mr. Poste in his edition of Gaius (1st ed.), 397, regards it as a mistake. Mr. Poste omits the criticism in his third edition. Cp. *Ambler v. Whipple*, 20 Wall. (U. S.) 546, where defendant entered into partnership with "a man of genius" but "of intemperate habits." See the Partnership Act 1890 (53 & 54 Vict. c. 39), ss. 19, 24.

⁶ *Ante*, 1052.

⁷ Dig. 17, 2, 52, § 3; *Damna quæ imprudentibus accidunt, hoc est, damna fatalia, socii non cogentur præstare.*

⁸ *Quod medicis pro se datum est, recipere potest:* Dig. 17, 2, 61.

⁹ Wharton (2nd ed.), Negligence, § 740; Erskine, 3, 3, 21.

The diligence of the partner is determined most often by the mutual confidence which is the foundation of the contract. If circumstances interfere with the application of this rule, the test is what Erskine terms "that middle kind of diligence which prudent men employ in their own affairs." Where the diligence required is not personal, the test may be referred to the standard of the *diligentia diligentis*. The case of partnership differs from other cases in this: that the accused partner may discharge himself by shewing that his partnership actions are governed by identical principles with those prevailing in his private business: *Quia qui parum diligentem sibi socium acquirit de se queri debet*. On the other hand, it may be shewn that the partner charged with negligence is a person of extraordinary skill and care, in which event the lack of the application of the qualities which prompted his selection would warrant holding him liable for his default.¹

The mutual confidence between partners determines the amount of care that is to be applied to the partnership affairs.

This is the distinction marked in the Roman law by the phrases *culpa in concreto*, that is, negligence in the individual, opposed to *culpa in abstracto*, negligence generally, apart from the idiosyncrasies of the individual.

Good faith is required in a partner as well as diligence. A partner may not divert the partnership funds to any purpose foreign to the scope of business. If a partner is guilty of gross negligence, unskilfulness, fraud, or wanton misconduct in the course of the partnership business, he is ordinarily responsible to the other partners for all losses and damages sustained thereby.² A joint owner, on the other hand, cannot discharge himself of his responsibility in case of the loss of the subject of the joint ownership by shewing that he has bestowed on it the same care which he bestows on his separate property; he is bound to shew that he took the care which men ordinarily take of their property.³

A Good faith ; required in a partner.

As regards the outside world, the partners, apart from express notice, are liable for the acts of each other, or of the agents of the partnership, on the ordinary principles of the law—that is, when they are acting within the scope of the partnership affairs or in the interest of the partnership.⁴

Rule of liability with regard to third persons.

¹ *Ante*, 1369.

² *Maddeford v. Austwick*, 1 Sim. 89; *Story, Partnership*, §§ 169, 173; *Pothier, Traité du Contrat de Société*, n. 133, where the case of partners having a carriage in common is put, which each is to have equal opportunity of using in turn.

³ *Guillot v. Dossat* (1816), 4 Martin (La.) 203, where the principles of the Civil Law are examined.

⁴ *Bank of Australasia v. Breillat*, 6 Moo. P. C. C. 152, at 193; *Bayley v. Manchester, Sheffield, and Lincolnshire Railway Company*, L. R. 8 C. P. 148; *Moreton v. Hardern*, 4 B. & C. 223, case of partners of a coach liable for the negligence of one of their number—the wrongdoer in trespass, the co-partners in case; 3 Kent Comm. 46; *Steel v. Lester*, 3 C. P. D. 121, joint interest in a ship. The contracts of partners are at law joint contracts, *Kendall v. Hamilton*, 4 App. Cas. 504. With what Lord Cairns, C., says at 517, compare per Marshall, C.J., in *Barry v. Foyles*, 1 Peters (U.S.)

James, V.C.'s,
summary of
the law.

The principle was pithily expressed by James, V.C., in *Dundonald (Earl of) v. Masterman*: "All the profits arising from the transaction by him of the plaintiff's business resulted to the firm; and the firm must bear the expense of any miscarriage by him, whether by negligence or dishonesty, in the conduct of the business."

Documents in
possession of
co-partner.

It is not negligence to leave documents in the possession of a co-partner;² while on the dissolution of a partnership by death, the fact of continuing money in the hands of the survivors is evidence of a transfer of credit from the old to the new partnership, which, other things being the same, increases in probative weight in proportion to the time allowed to elapse without a change being suggested.³

By sec. 28 of the Partnership Act, 1890,⁴ partners are bound to render true accounts and to give full information of all things affecting the partnership to any partner or his legal representatives.

DIRECTORS OF COMPANIES.

Limited
liability
companies.

The Companies Acts,⁵ with their various amending and regulating Acts,⁶ have constituted another species of partnership than

311, at 317: "The principle is that a contract made by co-partners is several, as well as joint, and the *assumpsit* is made by all, and by each. It is obligatory on all, and on each of the partners." But see *Mason v. Eldred*, 6 Wall. (U. S.) 231. *Ante*, 200. See the Partnership Act 1890 (53 & 54 Vict. c. 39) s. 9; for the liability of a firm for wrongs, see ss. 10-12; for the procedure against partnership property for a partner's separate judgment debt, see s. 23. If a bill of exchange be drawn by one partner in the name of the firm, and within the scope of the partnership, or if a bill drawn on the firm by their usual name and style be accepted by one of the partners, all the partners are bound: *Le Roy, Bayard & Co. v. Johnson*, 2 Peters (U. S.) 186, at 197. As to the scope of a partnership which admits of the drawing of bills of exchange, *Kimbro v. Bullitt*, 22 How. (U. S.) 256. For the case of a partner drawing notes in the name of the firm payable to himself and indorsing them to a third party for a personal and not a partnership consideration, *Smyth v. Strader*, 4 How. (U. S.) 404. See the Partnership Act 1890 (53 & 54 Vict. c. 39), ss. 5, 6, and 7. In equity the creditor of a firm has a concurrent remedy against the estate of a deceased partner, *Beckett v. Ramadale*, 31 Ch. Div. 177, where *Kendall v. Hamilton* is discussed and explained by Bowen, L.J., at 188; *Sawyer v. Goodwin*, 36 L. J. Ch., 578. Time under the Statute of Limitations only begins to run against a partner from an act of exclusion, *Barton v. North Staffordshire Railway Company*, 38 Ch. D. 458.

¹ L. R. 7 Eq. 504, at 517.

² *Cottam v. Eastern Counties Railway Company*, 1 J. & H. 243; *Johnston v. Renton*, L. R. 9 Eq. 181; *Cavander v. Bulteel*, L. R. 9 Ch. 79, where the rule in *Daniels v. Davison*, 16 Ves. 249, is applied, holding that if a person is in possession of property, notice of the title under which he is in possession must be attributed to every one who deals with that property. *Post*, 1643.

³ *Devaynes v. Noble*, 1 Meriv. 529, at 551.

⁴ 53 & 54 Vict. c. 39.

⁵ 25 & 26 Vict. c. 89, 30 & 31 Vict. c. 131. Sec. 38 of this latter Act is applicable only for the protection of shareholders, and does not create a statutory duty towards bondholders of the company or others: *Cornell v. Hay*, L. R. 8 C. P. 328. For the construction of this sec. see *Sullivan v. Mitcalfe*, 5 C. P. Div. 455.

⁶ 33 & 34 Vict. c. 104; 40 & 41 Vict. c. 26; 42 & 43 Vict. c. 76; 43 Vict. c. 19; 46 & 47 Vict. c. 30; 47 & 48 Vict. c. 56; 51 & 52 Vict. c. 48; 52 & 53 Vict. c. 37; 53 & 54 Vict. c. 62; 53 & 54 Vict. c. 64; 54 & 55 Vict. c. 43; 55 & 56 Vict. c. 36. The two last acts refer to forged transfers.

that existing at common law, with different relations and responsibilities.

The business of a company incorporated under the Companies Acts, whether with limited or unlimited liability, is managed by the directors, subject to certain control by a general meeting of the shareholders;¹ with the proviso that no regulation made by a general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.²

Directors, said Jessel, M.R.,³ “are really commercial men managing a trading company for the benefit of themselves and of all the other shareholders in it.” It must be borne in mind that, as their powers are the creation of statutes, the sole tests of the limitations of their action are the statutes by which they are empowered. Thus it is not accurate to describe them by any one term connoting recognized and limited incidents at common law: since they are affected by other principles importing other relations; and it is essential to bear in mind, when using terms indicating the powers of directors under the Companies Acts, “that such expressions are used, not as exhaustive of the powers or responsibilities of those persons, but only as indicating useful points of view from which they may for the moment and for the particular purpose be considered.”⁴

Directors' liability may be looked at in two aspects:⁵ I. As the directors act for the company of which they are directors, as a trading concern, in the prosecution of the purposes of its incorporation; and II. As the directors act on behalf of the shareholders, and have possession of assets for distribution amongst the shareholders.

I. As the directors act for the company of which they are directors, as a trading concern, in the prosecution of the purpose of its incorporation.

In this capacity their position is that of agents at common law, and the company is their principal. “What,” says Cairns, L.J., in *Ferguson v. Wilson*,⁶ “is the position of directors of a

¹ 25 & 26 Vict. c. 89, sched. i., art. 55. A joint-stock company is not an agreement between a great many persons that they will be co-partners, but is an agreement between the owners of shares or stock to continue an association together, sharing profits and bearing losses: *Baird's Case*, L. R. 5 Ch. 725, per James, L.J., at 734.

² *Iale of Wight Railway Company v. Tahourdin*, 25 Ch. Div. 320, at 331.

³ *In re Forest of Dean Coal Mining Company*, 10 Ch. Div. 450, at 452.

⁴ Per Bowen, L.J., *Imperial Hydropathic Hotel Company, Blackpool v. Hampson*, 23 Ch. Div. 1, at 12. Brett, L.J., discusses this in *Wilson v. Lord Bury*, 5 Q. B. Div. 518, at 526; cp. *In re Barney*, *Barney v. Barney* (1892), 2 Ch. 265.

⁵ *Briggs v. Spaulding*, 141 U. S. (34 Davis) 132, at 147. See per Earl, J., *Hun v. Cary*, 82 N. Y. 65, at 79.

⁶ L. R. 2 Ch. 77, at 89. *The National Exchange Company of Glasgow v. Drew*, 2 Macq. (H. L. Sc.) 103, contains a full discussion by the House of Lords of the position of the directors of a company, holding that when a report presented by directors is adopted by

public company? They are mere agents of a company. The company itself cannot act in its own person, for it has no person; it can only act through directors, and the case is, as regards those directors, merely the ordinary case of principal and agent. Wherever an agent is liable these directors would be liable; where the liability would attach to the principal, and the principal only, the liability is the liability of the company."

Rule fixing
the liability
for negligence.

The degree of negligence necessary to impose liability in the case of directors acting as agents in matters reasonably necessary for the management of the company¹ follows from ascertained rules. A man who acts as director in any matter thereby *prima facie* impliedly undertakes that he has reasonable and ordinary skill fit for the business in which he engages; if he fails of this amount of skill he is liable.²

Judgment in
Percy v.
Millaudon.

This is pointed out in a judgment of the Supreme Court of Louisiana as follows:³—"It is not contemplated" "that they (directors) should devote their whole time and attention to the institution to which they are appointed, and guard it from injury by constant superintendence. Other officers, on whom compensation is bestowed for the employment of their time in the affairs of the bank" (company) "have the immediate management. In relation to these officers, the duties of directors are those of control, and the neglect which would render them responsible for not exercising that control properly must depend on circumstances, and in a great measure be tested by the facts of the case. If nothing has come to their knowledge to awaken suspicion of the fidelity of the president and cashier, ordinary attention to the affairs of the institution is sufficient. If they become acquainted with any fact calculated to put prudent men on their

the general meeting of a company, though the original statements contained may be *ultra vires*, yet as against outsiders the representations contained in it become binding on the company.

¹ *Ex parte Booker*, 14 Ch. D. 317.

² *Story, Agency* (9th ed.), § 184.

³ *Percy v. Millaudon* (1829), 8 Mart. N. S. (La.) 68, at 75. The passage cited in the text is set out in *Story, Bailments*, § 173. See also § 186a. As to the case cited, *Story* observes, *Bailments*, § 186b: "How far similar doctrines will be adopted in Courts sitting under the jurisprudence of the common law remains for future discussion in those Courts, as I am not aware that the question has as yet been litigated therein. But there can be little doubt that these doctrines are just conclusions from the general law of mandates." The conclusion of the passage extracted in the text from the judgment in *Percy v. Millaudon*, at 78, is: "The test of responsibility therefore should be, not the certainty of wisdom in others, but the possession of ordinary knowledge; and by shewing that the error of the agent is of so gross a kind that a man of common sense and ordinary attention would not have fallen into it. The rule which fixes responsibility, because men of unerring sagacity are supposed to exist, and would have been found by the principal, appears to us essentially erroneous." See the judgment of *Fuller, C.J.*, in *Briggs v. Spaulding*, 141 U. S. (34 Davis), 132. See as to the public examination of directors under the Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 93), s. 8, *New Zealand Loan and Mercantile Agency Company, Limited*, 10 Times L. R. 371, per *Williams, J.*, 379 (C. A.).

guard, a degree of care commensurate with the evil to be avoided is required, and a want of that care certainly makes them responsible."¹

The standard, then, of duty is that which a business man capable of acting in the particular directorship would be expected to shew. The absence of this Wharton's terms *culpa levis*—that is, not shewing the diligence a good director should. Brett, L.J., however, in *Wilson v. Lord Bury*,² speaking of "the neglect of taking the same care, which a person of ordinary prudence and skill would take of his own similar affairs," regards the term "gross negligence" as not inapplicable to describe it.

Standard of duty.

Brett, L.J.,
in *Wilson v.*
Lord Bury.

Here again, then, there recurs the almost inextricable confusion wrought in the endeavour to discriminate degrees of negligence. Taking the division of the civil law of negligence into *culpa lata* and *culpa levis*, and adopting the view that this division corresponds with the distinction between the lack of diligence of an ordinary person and the lack of diligence of an expert, another ground of confusion suggests itself. Lack of diligence by an expert is not measured by the same standard in all cases. The test of his accountability varies with the particular pretensions he advances. This we have already seen in the case of medical men and solicitors.³

Comment.

The care required to guard against accountability for lack of diligence is not always the same, even where it is recognised that the test applicable is that of expert diligence. To discriminate the larger from the lesser degree of accountability, the term *crassa negligentia* may well be applied, to signify the neglect of a person of ordinary prudence and skill as distinguished from that other degree of negligence which affixes liability where a special exercise of skill is in any way called for.⁴

Admitting this distinction, a director is liable if he do that which a man of ordinary prudence in his own affairs would not do; he is not liable if he acts in good faith, and with proper care, and with a reasonable even if not a high degree of skill.⁵ As Lord Hatherley, C., states the law in *Land Company of Ireland v. Lord Fermoy*:⁷ "Whatever may be the case with a trustee, a director cannot be held liable for being defrauded; to do so would make his position intolerable."

Distinction
between the
liability of a
director and
the liability
of a trustee.

¹ Cp. *United Society of Shakers v. Underwood*, 9 Bush (Ky.) 609, *United States Digest*, 1875, Banking, 25, where, says Dr. Bigelow, L. C., on Torts, 518, "the English rule has been virtually rejected."

² Negligence (2nd ed.), § 510.

³ 5 Q. B. Div. 518, at 528.

⁴ *Ante*, 1397 and 1424.

⁵ *Ante*, 46.

⁶ *Hodges v. New England Screw Company*, 1 R. I. 312, 3 R. I. 9, cited Bigelow, L. C. on Torts, 619; see *United States Digest* 1870, Corporation, 143. Cp. *Dodge v. Woolsey*, 18 How. (U. S.) 331, at 343.

⁷ L. R. 5 Ch. 763, at 772.

Marzetti's
Case.

Judgment of
Jessel, M.R.,

and of James,
L.J., in the
Court of
Appeal.

Knowledge of
books of
company
required from
a director.

In *In re Railway and General Light Improvement Company, Marzetti's Case*,¹ both before the Master of the Rolls and in the Court of Appeal, these principles were adopted. "It is said," said Jessel, M.R.,² "he [a director who authorized a payment without inquiry, which proved to be one incurred in fraudulently raising the price of the company's shares in the market] is not liable, because he is an honest man. I have heard nothing against him to shew that there was more than negligence or carelessness on his part, but still he is liable. He is not to pay away other people's money without knowing what he pays it for; if he does, he must take the consequences."³ The Court of Appeal affirmed this decision, James, L.J., saying:⁴ "A director should not be held liable upon any very strict rules, such as those, in my opinion, too strict rules which were laid down by the Court of Chancery to make unfortunate trustees liable; directors are not to be made liable on those strict rules which have been applied to trustees. But they must shew something like reasonable diligence. It would be impossible that any man managing his own affairs would make such a payment as this without any real or effective inquiry." The purpose of this is plainly confined to those cases where directors are acting as agents for the company, and in their relation to the company in their capacity of agents.⁵

The expression used by Jessel, M.R., in the Court of Appeal in *Hallmark's Case*⁶ must also be noted here as indicating the amount of knowledge of the books of a company required in law of a director to safeguard him against liability for negligence. "Is knowledge to be imputed to him (a director) under any rule of law? As a matter of fact, no one can suppose that a director of a company knows everything which is entered in the books,

¹ 42 L. T. 206, 28 W. R. 541. The passage immediately following the portion of Jessel, M.R.'s, judgment above as reported would lend countenance to a much severer rule than seems warranted. Jessel, M.R., continues: "I cannot treat a director, who is paid for his services, like a managing partner, because he is also a trustee, in the same way I should treat an ordinary trustee of a marriage settlement, who acts gratuitously, and is not bound to have any special knowledge of the business he undertakes to perform." This must be taken with reference to special and technical knowledge, which is not to be implied in the case of a trustee, but is to be in the case of a director. *Sheffield and South Yorkshire Permanent Building Society v. Aislewood*, 44 Ch. D. 412, at 453; *In re New Mashonaland Exploration Company* (1892), 3 Ch. 577, under the Companies Winding Up Act (1890) (53 & 54 Vict. c. 63), s. 10.

² 42 L. T. at 208.

³ *Cp. Joint Stock Discount Company v. Brown*, L. R. 8 Eq. 381; *In re Liverpool Household Stores Association*, 59 L. J. Ch. 616.

⁴ 28 W. R. at 542.

⁵ *Meux's Executors' Case*, 2 De G. M. & G. 522, distinguished *In re Devals Provident Gold Mining Company*, 22 Ch. D. 593. As to directors of a business necessarily hazardous and the rule of diligence they must adopt, see *Overend, Gurney & Co. v. Gurney*, L. R. 4 Ch. 701, L. R. 5 H. L. 480.

⁶ 9 Ch. Div. 329, at 332. *Cp. per Earl, J., Wakeman v. Dalley*, 51 N. Y. 27, at 32.

and I see no reason why knowledge should be imputed to him which he does not possess in fact. Why should it be his duty to look into the list of shareholders? I know no case except *Ex parte Brown*¹ which shews that it is the duty of a director to look at the entries in any of the books; and it would be extending the doctrine of constructive notice far beyond that or any other case to impute to this director the knowledge which it is sought to impute to him in this case"—i.e., knowledge of the books of the company.

The degree of diligence required of directors was the subject of inquiry in a banking case in the Supreme Court of the United States, where Harlan, J., expresses the rule of duty as follows:² "Directors cannot in justice to those who deal with the bank shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect the officers of the bank and make declarations of dividends. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business." This statement, if helpful, is still not perspicuous. Such terms as "ordinary diligence," "reasonable control," and "proper diligence" point to fruitful sources of ambiguity. They may perhaps be reduced to the requirement of the diligence of a good average business man, not in the exercise of specialty knowledge.³

Rule of duty as stated by Harlan, J., in *Martin v. Webb*.

In the subsequent case of *Briggs v. Spaulding*⁴ the Supreme Court of the United States was divided five against four, as to the elements required to constitute negligence in a director. The judgment of the majority, which was delivered by Fuller, C.J., seems to follow the English rule. It is thus stated:⁵ "The degree of care to which these defendants were bound is that which ordinarily prudent and diligent men would exercise under similar circumstances, and in determining that the restrictions

Briggs v. Spaulding.

¹ 19 Beav. 97. See *In re Denham*, 25 Ch. D. 752, where Chitty, J., discusses the effect of the issue of documents by directors to shareholders and to the public respectively.

² *Martin v. Webb*, 110 U. S. (3 Davis) 7, at 15.

³ In *Savings Bank of Louisville v. Caperton*, 12 Am. St. R. 488, the liability of bank directors for the defalcations of a cashier was considered.

⁴ 141 U. S. (34 Davis), 132; see also *North Hudson Mutual Building and Loan Association v. Childs*, 33 Am. St. R. 57.

⁵ 141 U. S. (34 Davis) at 152.

of the statute and the usages of business should be taken into account. What may be negligence in one case may not be want of ordinary care in another, and the question of negligence is, therefore, ultimately a question of fact, to be determined under all the circumstances." Therefore, if a director is seriously ill, it is in the power of the others to give him leave of absence for a year instead of requiring him to resign, and if frauds are committed during the year, he is not responsible.¹ There was, however, a dissentient opinion by four of the judges, the contention of which was that directors may not "abdicate their functions and leave its (their company's) management and the administration of its affairs entirely to executive officers."² In the subsequent case of *Swentzel v. Penn Bank*³ a bank director was said to be "a gratuitous mandatory" and "only liable for fraud or such gross negligence as amounts to fraud."

Duty of directors stated to be "to exercise ordinary skill and diligence."

The duty of directors has also been stated⁴ to be "to exercise ordinary skill and diligence" and to be "liable for losses resulting from mismanagement of the affairs and business of the bank." "But for excusable mistakes concerning the law and for errors of judgment when acting in good faith they are not liable." A well-known American text writer⁵ thus treats the point: "The plain and obvious rule is, that directors impliedly undertake to use as much diligence and care as the proper performance of the duties of their office requires. What constitutes a proper performance of the duties of a director is a question of fact, which must be determined in each case in view of all the circumstances; the character of the company, the condition of its business, the usual methods of managing such companies, and all other relevant facts must be taken into consideration. It is evident that no abstract reasoning can be of service in reaching a proper solution." For example, bank directors would not be liable for losses through allowing overdrafts to customers of character and integrity.⁶

To these statements must be added some valuable remarks of Earl, J., in *Hun v. Cary*⁷ explaining the passage just cited and harmonizing with the English decisions, with which indeed the preponderating American cases appear to coincide. The learned

¹ See per Jessel, M.R., *In re Forest of Dean Coal Mining Company*, 10 Ch. D. 450, at 451. See per Kay, L.J., *In re Lands Allotment Company* (1894), 1 Ch. 616, at 638; *In re Kennard*, *Kennard v. Collins*, 11 Times L. R. 283.

² See the dissentient opinion of Harlan, J., at 169.

³ 30 Am. St. R. 718.

⁴ *Marshall v. Farmers' &c. Savings Bank*, 17 Am. St. R. 84.

⁵ Morawetz, *Private Corporations*, § 552.

⁶ *Wallace v. Lincoln Savings Bank*, 24 Am. St. R. 625.

⁷ 82 N. Y. 65, at 74, 37 Am. R. 546.

judge says: "One who voluntarily takes the position of director, and invites confidence in that relation, undertakes, like a mandatar, with those whom he represents or for whom he acts, that he possesses at least ordinary knowledge and skill, and that he will bring them to bear in the discharge of his duties.¹ Such is the rule applicable to public officers, to professional men and to mechanics, and such is the rule which must be applied to every person who undertakes to act for another in a situation or employment requiring skill and knowledge; and it matters not that the service is to be rendered gratuitously." These defendants voluntarily took the position of trustees of the bank. They invited depositors to confide to them their savings, and to entrust the safe keeping and management of them to their skill and prudence. They undertook not only that they would discharge their duties with proper care, but that they would exercise the ordinary skill and judgment requisite for the discharge of their delicate trust."²

In *Overend, Gurney & Co. v. Gurney*³ an effort was made to charge directors where they had full power to do all they had done, but on the ground that acting as agents of the company they had misconducted themselves in purchasing that which it was unwise and imprudent of them to purchase. The business in which they were concerned was "a hazardous business—a business entirely dependent on the prudence and dexterity of those who manage it."⁴ "I think," said Lord Hatherley, C.,⁵ "that the shareholders must take the consequences of the manner in which their business was conducted by those whom they have trusted to act as their agents. If the question were simply whether they had or had not made a bad or imprudent bargain, that is not a question that could be dealt with in this Court as involving a breach of trust; or, if it were, whether they had failed to secure a good bargain for persons who intrusted the moneys to them for that purpose, that is not the case we have here. The company must take the consequences of having intrusted their moneys to persons of sanguine temperament, who

Judgment of
Earl, J.

Overend, Gurney & Co. v. Gurney.
Imprudent
exercise of
directors' powers.

Judgment of
Lord Hatherley, C.

¹ Story, Bailm. § 182.

² As to directors' liability for negligence, see note to *Marshall v. Farmers', &c. Savings Bank*, 17 Am. St. 84, 95-101; *Wallace v. Lincoln Savings Bank*, 24 Am. St. R. 625. By the Building Societies Act 1874 (37 & 38 Vict. c. 42), s. 43: "If any society under this Act receives loans or deposits in excess of the limits prescribed by this Act, the directors or committee of management of such society receiving such loans or deposits on its behalf shall be personally liable for the amount so received in excess." For the scope of this sec. see *Cross v. Fisher* (1892), 1 Q. B. 467. A similar provision is made in sec. 13 sub-s. 3 of the Building Societies Act 1894 (57 & 58 Vict. c. 47).

³ L. R. 4 Ch. 701. As to acts *ultra vires* see *Cullerne v. London and Suburban General Permanent Building Society*, 25 Q. B. Div. 485. Cp. *Verner v. General and Commercial Investment Trust* (1894) 2 Ch. 239.

⁴ L. R. 4 Ch. at 715.

⁵ L. c. at 720.

Lord Chelmsford's opinion in the House of Lords.

have made a purchase which turns out to be a bad one; but I do not find enough in this case to shew me that it is so ridiculous or absurd, or that there has been such *crassa negligentia*, amounting to fraud, as to induce me to hold that the gentleman whose executors are now sought to be impeached had made himself responsible for a breach of trust for which I can hold them liable." The Lord Chancellor's judgment was affirmed by the House of Lords,¹ where Lord Chelmsford, speaking of the acquiring of the business by the directors, which was the ground of the suit against them, said:² "They did it, it is admitted, honestly and fairly, and believing that they were doing it in the discharge of their duty, and it seems to me a very strong and unusual thing for a suit to be now instituted to make the directors liable for the loss which has occurred under these circumstances. In fact it amounts to this: an agent, (because these directors are really more in the character of agents than of trustees, they are mandatories,) an agent being authorized to do an act, which act is in itself an imprudent one, and which the principal ought never to have authorized to be done, is, when the loss is occasioned by his having done the act, to be made liable for it. That certainly is rather a startling proposition."

Turquand v. Marshall.

In *Turquand v. Marshall*³ directors made a loan to one of the brother directors, an act which was within the powers of the company's deed. The money was lost; and it was held that the Court could not interfere and make the directors liable. Lord Hatherley, C., states the principle applicable as follows:⁴ "They [the directors] were intrusted with full powers of lending the money, and it was part of the business of the concern to trust people with money, and their trusting to an undue extent was not a matter with which they could be fixed, unless there was something more alleged, as, for instance, that it was done fraudulently and improperly, and not merely by a default of judgment. Whatever may have been the amount lent to anybody, however ridiculous and absurd their conduct may seem, it was the misfortune of the company that they chose such unwise directors; but as long as they kept within the powers of their deed, the Court could not interfere with the discretion exercised by them. If a Bill had been filed to stop their lending money in this way, the Court, on the principle of the case of *Foss v. Harbottle*,⁵ could not have interfered on that ground."⁶

¹ L. R. 5 H. L. 480.

² L. R. 4 Ch. 376.

³ L. c. at 501.

⁴ L. c. at 386.

⁵ 2 Hare 461. Cp. *Macdougall v. Gardiner*, L. R. 10 Ch. 606; *Ile of Wight Railway Company v. Tahourdin*, 25 Ch. Div. 320.

⁶ In *London Financial Association v. Kelk*, 26 Ch. D. 107, Bacon, V.C., says,

The distinction between the duties of directors as managers of a trading company and those of trustees as managers of a settled estate arises from the different object in view in each case respectively. The funds which form the subject of a settlement are intended to be preserved for the benefit of those who may successively become entitled to them. The funds embarked in a trading company are on the other hand to be employed for the acquisition of gain, and risk is of the essence of the employment. Accordingly, Stirling, J.,¹ regards the law as "settled by such cases as *Overend & Gurney Company v. Gibb*² and *Turquand v. Marshall*³ that directors are not to be made liable for loss occasioned by mere imprudence or error of judgment in the exercise of the powers conferred on them."

Distinction
between duties
of directors
and of trustees.

Opinion of
Stirling, J.

The same learned judge points out the same distinction in *Sheffield and South Yorkshire Permanent Building Society v. Aizlewood*.⁴ He cites the rule stated by Lord Watson in *Learoyd v. Whiteley*:⁵ "Business men of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character; but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise to avoid all investments of that class which are attended with hazard." From this he concludes that: "Directors are not under an obligation to avoid investments attended with hazard, but may, in the absence of anything to the contrary in the rules or articles of association, act in the same manner as business men of ordinary prudence." The remedy is in the hands of any company that should deem such powers too wide; for "it is competent for the members to frame rules or articles of association so as to impose such restrictions as they may deem advisable." As a concrete instance of the greater liberty accorded to directors than trustees the same learned judge, later on in the same judgment,⁶ holds that they may take second mortgages since "the risk (arising from the probable want of means on the part of the mortgagor to pay off the first mortgagee, in the event of his attempting to enforce his right by foreclosure, to the disadvantage of the second mortgagee) is one which, as it seems to me, a business man of ordinary prudence might be willing to incur."

Sheffield and
South York-
shire Per-
manent
Building
Society v.
Aizlewood.

Directors not
bound to avoid
hazardous
investments.

at 144: "Among the multitudinous cases which have been cited in support of the plaintiff's contention" "there is not one, so far as I know, in which the directors of a joint stock company have been held to be answerable for losses sustained by their mere innocent mistake, nor unless that mistake has been accompanied by some fraudulent, or at least suspicious conduct or motive." See also the remarks of the V. C. at 146.

¹ *Leeds Estate Building and Investment Company v. Shepherd*, 36 Ch. D. 787, at 798.

² L. R. 4 Ch. 376.

³ 12 App. Cas. 727, at 733.

⁴ L. R. 5 H. L. 480.

⁵ 44 Ch. D. 412, at 454.

⁶ 44 Ch. D. at 459.

Liability of
directors
signing
cheques.

Judgment of
James, V.C.,
in Joint Stock
Discount
Company v.
Brown.

The duty attaching to directors who sign cheques on behalf of their company has been the subject of some extremely forcible remarks by James, V.C.,¹ which may with advantage be reproduced here. After observing on the contention that signing cheques for a company is to be treated as a mere ministerial act, the Vice Chancellor thus continues: "A company for its own protection against the misapplication of its funds requires that cheques should be signed by certain persons. Of course it is quite clear that no company of this kind could be carried on if every director were obliged to sign every cheque, and it is therefore required that the cheques should be signed by a certain number of persons for the safety of the company. That implies, of course, that every one of those persons takes care to inform himself, or, if he does not take care to inform himself, is willing to take the risk of not doing so, of the purpose for which and the authority under which the cheque is signed; and I cannot allow it to be said for a moment that a man signing a cheque can say 'I signed that cheque as a mere matter of form; the secretary brought it to me; a director signed it before me; two clerks have countersigned it; I merely put my name to it.' Most of us have been obliged to trust in the course of our lives to a great number of persons when we have had to sign deeds and things of that kind; but if we trust, of course we must take the consequences of our so trusting."

II. As the
directors act
for their
shareholders.

II. As the directors act on behalf of the *shareholders* as distinguished from the *company*, and have possession of assets for distribution amongst the shareholders.

Description
by Lord
Selborne, C.

This is touched on by Lord Selborne, C., in *Great Eastern Railway Company v. Turner*,² where he says: "Directors are the mere trustees or agents of the company—trustees of the company's money and property—agents in the transactions which they enter into on behalf of the company." Yet there is a wide distinction between the liability of directors to their shareholders for acts respectively *intra* and *ultra vires*.

Acts *ultra
vires*.

If the act charged against the directors is so outside the powers of the company that the company could not sanction the outlay, the directors may be made personally liable as trustees;³ for they cannot be justly said to be forwarding the purposes of the common venture, but rather to be misapplying funds with which they are entrusted.

¹ Joint Stock Discount Company v. Brown, L. R. 8 Eq. 381, at 404.

² L. R. 8 Ch. 149, at 152.

³ Sheffield and South Yorkshire Permanent Building Society v. Aislewood, 44 Ch. D. 412, at 452; *In re Faure Electric Accumulator Company*, 40 Ch. D. 141; *Land Credit Company of Ireland v. Lord Fermoy*, L. R. 8 Eq. 7, L. R. 5 Ch. 763; *Grimes v. Harrison*, 26 Beav. 435. Cp. *In re Lands Allotment Company* (1894), 1 Ch. 616.

If the act charged against the directors is one within the powers of the company, they are not liable, unless it is of "a character so plain, so manifest, and so simple of appreciation that no men with any ordinary degree of prudence acting on their own behalf would have entered into such a transaction as they entered into."¹

In *Flitcroft's Case*² the principal ground of decision was indeed that payment of dividends had been made out of capital, and that as such payments were *ultra vires*, they affected the directors with a liability which shareholders as a body could not assume to themselves. The principle was also involved of the act of the directors being a breach of trust against which the protection of the Statute of Limitations was unavailing. *Flitcroft's Case* may be cited as shewing that a different rule is to be applied to the acts of the directors as agents for carrying out the purposes of the incorporation with the outside world and the acts of the directors as between them and the shareholders as depositaries of the realized property of the concern.³

But section 8 of the Trustee Act, 1888,⁴ enables them as trustees to plead the Statute of Limitations, where nothing of the nature of fraud is involved.⁵

Kay, J., in *In re Oxford Benefit Building and Investment Society*⁶ held it settled law :

1. That directors are *quasi-trustees* of the capital of the company ;

2. That directors who improperly pay dividends out of capital are liable to repay such dividends personally, upon the company being wound up.⁷

To this head of acting on behalf of the *shareholders* as dis-

¹ *Overend & Gurney Company v. Gibb*, L. R. 5 H. L. 480, at 487 ; *Joint Stock Discount Company v. Brown*, L. R. 8 Eq. 381 ; *Turquand v. Marshall*, L. R. 4 Ch. 376.

² 21 Ch. D. 519. Cp. *Verner v. General and Commercial Investment Trust*, (1894) 2 Ch. 239.

³ *Masonic and General Life Assurance Company v. Sharpe* (1892), 1 Ch. 154, at 167. "The liability of a director . . . being treated as a breach of trust, I apprehend that the Statute of Limitations would not apply even after a director had ceased to be a director : " see *Metropolitan Bank v. Heiron*, 5 Ex. Div. 319, per Lindley, L.J., at 169. *In re Mammoth Copperopolis of Utah*, 50 L. J. (Ch.) 11, is considered with reference to the defence of staleness of demand.

⁴ 51 & 52 Vict. c. 59. ⁵ *In re the Lands Allotment Company* (1894), 1 Ch. 616, where it was held that, "though directors are not, properly speaking, trustees, yet they have always been considered and treated as trustees of money which comes to their hands or which is actually under their control ; and ever since joint-stock companies were invented, directors have been held liable to make good moneys which they have misapplied, upon the same footing as if they were trustees, and it has always been held that they are not entitled to the benefit of the old Statute of Limitations because they have committed breaches of trust, and are in respect of such moneys to be treated as trustees " : per Lindley, L.J., at 631. They are consequently within the Trustee Act, 1888 (51 & 52 Vict. c. 59), ss. 1, 8.

⁷ *Evans v. Coventry*, 8 De G. M. & G. 835 ; *Joint Stock Discount Company v.*

tinguished from the *company* must also be referred the case, described by Cairns, L.J.,¹ "where a shareholder files a bill against the company and against the directors, treating the directors as his trustees, which in point of law they are, and seeking redress against them for a breach of trust." The shareholder who files the bill in fact alleges "that the company has done no wrong whatever, that it is the executive which has committed the wrong, and they—the shareholders—file the bill to protect, as it were, the company from the unlawful acts of the directors. There the directors, being in the position of trustees, are of course liable."²

Directors
holding a
fiduciary
capacity.

Where directors stand in a fiduciary relation to other parties they become disentitled to occupy any position which will conflict with the interest of those they represent, and whom they are bound to protect. Consequently they cannot, as agents or trustees, enter into or authorize contracts on behalf of those for whom they are appointed to act, so as to receive any benefit special to themselves and not partaken in by their shareholders.³

Cullerne v.
London and
Suburban
General
Permanent
Building
Society.

In *Cullerne v. London and Suburban General Permanent Building Society*,⁴ the plaintiff, a director of the defendant company, concurred with the other directors in passing a resolution authorizing advances to members on the security of their shares. In accordance with the resolution an advance was made to a member, which resulted in a loss, but the plaintiff was not present and did not concur in the advance. In an action brought by the plaintiff the other directors counterclaimed in respect of the loss they had incurred, on the ground that the advance was *ultra vires*, and was attributable to the illegal resolution which authorized such advances. The Court of Appeal

Brown, L. R. 8 Eq. 381; *Salisbury v. Metropolitan Railway Company*, 22 L. T. (N. S.) 839; *Leeds Estate Building and Investment Company v. Shepherd*, 36 Ch. D. 787; distinguished *In re Cawley & Company*, 42 Ch. D. 209; *In re National Funds Assurance Company*, 10 Ch. D. 118; *Studdert v. Grosvenor*, 33 Ch. D. 528.

¹ *Ferguson v. Wilson*, L. R. 2 Ch. 77, at 90.

² *Cp. German Mining Company, Ex parte Chippendale*, 4 De G. M. & G. 19, at 52; *Bennett's Case*, 5 De G. M. & G. 284, at 294; *Madrid Bank v. Pelly*, L. R. 7 Eq. 442; *Ex parte Williams*, L. R. 2 Eq. 216; *Parker v. M'Kenna*, L. R. 10 Ch. 96; *Gilbert's Case*, L. R. 5 Ch. 559; *Sykes's Case*, L. R. 13 Eq. 255; *Charitable Corporation v. Sutton*, 2 Atk. 400. As to the sense in which directors are said to be trustees, see note to *Beach v. Miller*, 17 Am. St. R. 291, at 298-308.

³ *In re Faure Electric Accumulator Company*, 40 Ch. D. 141; *Great Luxembourg Railway Company v. Magnay* (No. 2), 25 Beav. 586; *York and North Midland Railway Company v. Hudson*, 16 Beav. 485; *Benson v. Heathorn*, 1 Y. & C. (Ch.) 326; *Wardell v. Railroad Company*, 103 U. S. (13 Otto), 651. See also *In re Lands Allotment Company* (1894), 1 Ch. 616.

⁴ 25 Q. B. Div. 485. Reliance was placed by the plaintiff in *Cullerne's Case* on the judgment of Wickens, V.C., in *Pickering v. Stephenson*, L. R. 14 Eq. 322; followed by Kay, J., in *Studdert v. Grosvenor*, 33 Ch. D. 528, and as to which Lindley, L.J., says, at 490: "I never could understand that part of the V.C.'s judgment, nor can I understand it now. I think he was wrong." The part alluded to was that which held that approval by a majority of a company of acts *ultra vires* can avail as a defence to an action to charge them for so acting. See *Masonic and General Life Assurance Company v. Sharpe* (1892), 1 Ch. 154, at 165.

disallowed the counterclaim, pointing out that if the resolution alone had been passed nothing would have happened; since the loss arose from a new wrongful act by independent persons. The plaintiff ought not to have passed the resolutions, and his co-directors ought not to have acted on them. "I am not aware of any authority," said Lindley, L.J.,¹ "which goes the length of deciding that under these circumstances the plaintiff is liable for what they have done. They were not his servants or agents; their authority was as great as his; their knowledge the same as his; and, even assuming that he misled them upon a point of law, this does not make him liable to the society for the loss of money which they advanced, and not he."

The liability of directors under the analogy of trustees has been summarized² under, amongst others, the following heads:—

Liability of directors under the analogy of trustees.

1. Those directors are liable who—

- (a) are directly implicated in the wrongful act;
- (b) have notice of it, and do not interfere to prevent it;³ and
- (c) having notice, and objecting, do not take active steps to prevent it.⁴

2. Those directors who join the board after the commission of a breach of trust (if at all liable),⁵ are liable for the extra loss occasioned by their inaction.⁶

3. Those directors who have no notice of breach of trust are not liable for the acts of their co-directors.⁷

Chitty, J., emphasizes the distinction between the acts of the directors when they are acting on behalf of the company with regard to third persons and when they are acting for the shareholders in a fiduciary capacity. "A prospectus," he says,⁸ "purports to be issued by all the directors whose names appear on the face of it; and it may well be that an ignorant director who has not really been personally engaged in issuing the prospectus is

Distinction between the acts of directors acting on behalf of the company with regard to third persons and when acting for the shareholders in a fiduciary capacity.

¹ 25 Q. B. Div. at 489.

² Healey, Law and Practice of Joint Stock Companies (3rd ed.), 150.

³ *In re Grant*, 7 Moo. P. C. C. 141.

⁴ *Joint Stock Discount Company v. Brown*, L. R. 8 Eq. 381; and see per Fry, J., *Cargill v. Bower*, 10 Ch. D. 502, at 514; *Jackson v. Munster Bank*, 15 L. R. Ir. 356.

⁵ "I am not aware of any authority which goes the length of saying that a director who is not a party to any misapplication of a company's funds is liable for not taking legal proceedings to upset the transaction after the thing is done, and I do not think it would be in accordance with the principles applicable to these cases if we were now first to make a precedent of that kind;" per Lindley, L.J., *In re Lands Allotment Company* (1894), Ch. 616, at 635. Cp. *Jackson v. Munster Bank*, 15 L. R. Ir. 356.

⁶ *Turquand v. Marshall*, L. R. 4 Ch. 376, where the Scottish cases to the contrary are cited; *In re Forest of Dean Coal Mining Company*, 10 Ch. D. 450. Cp. *Boardman v. Mosman*, 1 Bro. C. C. 68; *Walker v. Symonds*, 3 Swanst. 1, at 41.

⁷ *In re Denham & Co.*, 25 Ch. D. 752; *In re Montrotier Asphalte Company*, *Perry's Case*, 34 L. T. (N. S.) 716; *Townley v. Sherborne*, 2 White & Tudor L. C. Equity (6th ed.), 960, at 1018, note, How far persons are liable for the Acts or Defaults of Co-trustees and Co-executors.

⁸ *In re Denham & Co.*, 25 Ch. D. 752, at 765.

bound on the ground of his ratification ; and such ratification may, when circumstances justify it, be inferred from his abstaining from taking any steps to inform the public that he was not a party to issuing the prospectus. But the report of directors at a general meeting is issued under the powers of the articles, and is generally, as it certainly was here, made by the Board acting as such. The shareholders in this company knew, or must be deemed to have known, the provisions of the articles that two directors were to be a quorum, and therefore they were not justified, in my opinion, in accepting the report as the act of all the directors." Thus the directors' liability as trustees is in that particular not only narrower than that of a private trustee, but narrower than the liability of the directors as agents ; for they are only liable according to the articles of association, which circumscribe what would otherwise be the general liability of trustees ; while their liability as agents is fixed by the incidents which the common law attaches in the case of dealings with third persons. On the other hand, it must not be lost sight of that a director permitting the use of his name and neglecting to attend to his duties may, as Chitty, J., points out, be bound by acts which he neither investigates nor repudiates.

Joint and
several
liability of
directors.

4. Those directors, who are jointly implicated in a breach of trust are, as a rule, jointly and severally liable to the company in respect of it ; but if the results are separable, then each is liable for his own acts and defaults alone.¹ Furthermore, it has been held that directors, who herein differ from trustees, are not liable for mere nonfeasance, "without fraud and without dishonesty," in omitting to take proceedings to enforce a claim belonging to the company ;² though to render them liable it is not necessary that they should derive benefit, or even contemplate benefit, from the transaction complained of.³

5. Contribution may be ordered between co-directors who are jointly implicated in a breach of trust, at least where the breach consists only in the doing of some act not in itself illegal but unauthorized.⁴

¹ *Parker v. M'Kenna*, L. R. 10 Ch. 96 ; *Madrid Bank v. Pelly*, L. R. 7 Eq. 442 ; *In re Englefield Colliery*, 8 Ch. Div. 388 ; *In re Carriage Co-operative Supply Association*, 27 Ch. D. 322 ; *In re London and Provincial Starch Company*, 20 L. T. (N. S.) 390, as to joint and several liability ; as to which see further *ante*, 200 n.¹.

² *In re Forest of Dean Coal Mining Company*, 10 Ch. D. 450 ; *In re Wedgwood Coal and Iron Company*, 47 L. T. 612. *In re Cardiff Savings Bank, Davies's Case*, 45 Ch. D. 537, is an instance of liability arising from an omission to act.

³ *In re British Guardian Life Assurance Company*, 14 Ch. D. 335. The duties of an auditor, and also of the secretary and manager of a company, under the Limited Liability Acts, are considered by Stirling, J., *Leeds Estate Building and Investment Company v. Shepherd*, 36 Ch. D. 787. See *In re London and General Bank (Limited)*, 11 Times L. R. 374 (C. A.).

⁴ *Ashhurst v. Mason* L. R. 20 Eq. 225 ; *Ramakill v. Edwards*, 31 Ch. D. 100.

Directors or officers of a joint-stock company who neglect to comply with the requirement of the Companies Act, 1870, which requires mortgages and charges on the property of the company to be registered, do not make void the security by their neglect to comply with the Act,¹ the effect of which is no more than to impose a pecuniary penalty for the non-performance of the statutory duty when that statutory duty is knowingly and wilfully omitted.²

Neglect to comply with the requirements of the Companies Act.

There are duties also incumbent on those dealing with companies which must be regarded.

Duty of those dealing with companies.

The external position of a company must be mastered by every one dealing with it; since its articles of association and the deed under which it acts are open to all, and those who have dealings with it are affected with notice of all they contain. But the internal arrangements are necessarily known to the directors alone, and their right action may be presumed so long as such action does not transcend what is permitted by the articles of association or the deed.³ Therefore a company cannot repudiate what is done in the usual course of business with a third party, where that third party deals *bona fide* with persons who may be termed *de facto* directors, and who might, so far as he could tell, have been directors *de jure*; since if the law were otherwise the ordinary business of companies could not be transacted.⁴

A liquidator is not liable to an action for damages for delay in performing his duty, unless the delay is wilful or fraudulent or arises from *mala fides*; for a liquidator is not properly described as a trustee, but is rather the agent of the company on whom are cast by statute and otherwise the duty of applying the company's assets in paying creditors and distributing the surplus amongst the shareholders. In this view he cannot be sued by a third party for negligence apart from misfeasance or personal misconduct.⁵ In the case of delay in distributing assets application can be made to the Court under sect. 138 of the Companies Act, 1862.

Liability of liquidator.

Delay in distributing assets.

A word must be added about the controversy terminated by the decision of *Derry v. Peek* in the House of Lords.⁶ Previously

Derry v. Peek.

¹ *Wright v. Horton*, 12 App. Cas. 371, overruling *In re Native Iron Ore Company*, 2 Ch. D. 345, for the reasons given in *In re Globe New Patent Iron and Steel Company*, 48 L. J. Ch. 295.

² As to the personal liability of directors, *Beattie v. Lord Ebury*, L. R. 7 H. L. 102; *West London Commercial Bank v. Kitson*, 13 Q. B. Div. 360; *Atkins v. Wardle*, 58 L. J. Q. B. 377, at 379. *Post*, 1477 n. 1.

³ *Mahony v. East Holyford Mining Company*, L. R. 7 H. L. 869, followed in *County of Gloucester v. Rudry Merthyr Steam and House Coal Colliery Company* (1895), 1 Ch. 629.

⁴ *In re County Life Assurance Company*, L. R. 5 Ch. 288. For powers of directors and agents, see *Lindley, Companies* (5th ed.), 154-172, 2 Kent. Comm. (12 ed.), 300 (n. 1), *Ultra Vires* (c.), *Powers of Directors and Agents*.

⁵ *Knowles v. Scott* (1891), 1 Ch. 717.

⁶ 14 App. Cas. 337.

to that decision one school of lawyers considered that a legal duty lay on persons promoting companies not only to believe what they recommended, but to take reasonable care in forming their beliefs—not merely to believe, but to believe intelligently. *Derry v. Peek* in the House of Lords settled the law adversely to this contention, and decided that where persons have formed a genuine belief no action will lie for negligence in forming it.¹ It is, however, pointed out by Bowen, L.J., in *Angus v. Clifford*² that what a man may represent as the state of his mind is by no means conclusive of what in fact is the state: “So far from saying that you cannot look into a man’s mind, you must look into it if you are going to find fraud against him; and unless you think you see what must have been in his mind, you cannot find him guilty of fraud.” “Once arrive at the inference of fact that the state of his mind was to his own knowledge not that which he describes it as being, then he has told a lie, just as if he made an intentional misstatement of something outside his own mind, and visible to the eyes of all men.” The distinction therefore is between a statement not true made carelessly and a statement not true made fraudulently, of which the latter only is actionable, as negligence is not deceit.

With the comment by Bowen, L.J., in *Angus v. Clifford*.

Doctrine of *Derry v. Peek* distinguished from doctrine of estoppel by representation.

Care must be taken not to confound the decision of *Derry v. Peek* with the doctrine of estoppel by representation. In *Derry v. Peek* the plaintiff’s contention was that the defendant’s representation was inaccurate. The defence was that if it was inaccurate, it was still not fraudulent. In a case of estoppel, on the other hand, the plaintiff’s claim is that the statement made by the defendant be taken as accurate against him. But in a case of deceit the plaintiff’s case is based not on the accuracy of the defendant’s statement, but upon its falsity. “Preventing the defendants from denying the truth of their representation would not enable the plaintiff to succeed in such an action; so that the plaintiff could not rely on estoppel.”³

Distinction between false information innocently given, where there is a duty, and where there is not a duty.

Once more, another distinction must be drawn between mere false information innocently given, where there is no duty to give information at all, and false information innocently given, where the informer is under a duty to give correct information. In the former case an action for damages resulting from acting on the information will not lie; in the latter it will. Bowen, L.J., clearly

¹ “To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth,” per Lord Herschell, *Peek v. Derry*, 14 App. Cas. 337, at 374.

² (1891) 2 Ch. 449, at 471; see also *Low v. Bouverie* (1891), 3 Ch. 82; *Le Lievre v. Gould* (1893), 1 Q. B. 491, per Bowen, L.J., at 499; *Glasier v. Rolla*, 42 Ch. 436, per Cotton, L.J., at 458.

³ Per Kay, L.J., *Low v. Bouverie* (1891), 3 Ch. 82, at 112; see also per Lord Denman, *Barley v. Walford*, 9 Q. B. 197, at 208.

expresses this in *Low v. Bouverie*:¹ "Negligent misrepresentation does not certainly amount to deceit and negligent misrepresentation can only amount to a cause of action if there exist a duty to be careful—not to give information except after careful inquiry." For example, a stranger standing at the entrance of a dock is asked by one navigating a vessel whether the entrance is wide enough to admit it safely to the dock. He answers, the width is fifty feet. The vessel is steered into the opening relying on fifty feet being the width, and is injured. There is no action. If, instead of a stranger being asked, the inquiry had been made of the harbour-master,² there would be an action.

Bowen, L.J.,
in *Low v.*
Bouverie.

The liability of directors for statements made in prospectuses and similar documents is extended by the Directors Liability Act, 1890.³

Directors
Liability Act,
1890.

¹ (1891) 3 Ch. 82, at 105.

² *The Apollo* (1891), App. Cas. 499.

³ 53 & 54 Vict. c. 64. See Healey, *Companies* (3rd ed.), 62.

CHAPTER II.

TRUSTEES AND EXECUTORS.

THE liability for negligence of trustees and of executors may conveniently be treated together.

Definition of trustee.

A trustee has been defined as "a person in whom some estate, interest, or power in or affecting property of any description is vested for the benefit of another."¹

Definition of executor.

An executor, as defined by Blackstone,² is one "to whom another man commits, by will, the execution of that his last will and testament." A trustee is the *genus* of which executor is a *species*.

Distinction between the position of trustees and the position of executors.

Certain differences there are between executors and trustees, such, for instance, as the executor's power of retainer,³ which is an implied power, and not inserted in the instrument from which he derives his authority; and the legal presumption that all trustees are liable to account for moneys paid to the trust, while only those executors are presumed liable who are shewn to have acted in any matter;⁴ and that, apart from statute, one trustee

¹ Per Woods, J., in *Taylor v. Davis*, 110 U. S. (3 Davis) 330. The same definition is found in Bouvier, Law Dictionary, *sub voc.* The Statutory Law relating to trustees is consolidated in the Trustee Act 1893 (56 & 57 Vict. c. 53). As to constructive trustees, or, in the language of Lord Selborne, trustees *de son tort*, *Barnes v. Addy*, L. R. 9 Ch. 244, at 251; *In re Barney*, *Barney v. Barney* (1892), 2 Ch. 265.

² 2 Bl. Comm. 503.

³ 2 Wms. Executors (9th ed.), 884-895. This right does not extend to a debt not enforceable by reason of the Statute of Frauds, *In re Rowson*, 29 Ch. Div. 358.

⁴ *Chambers v. Minchin*, 7 Ves. 186, where Lord Eldon states the reason for the rule; *Langford v. Gascoyne*, 11 Ves. 333; "At law a joint receipt is conclusive evidence that the money came to the hands of both, and is not to be contradicted. But this Court, which rejects estoppels and pursues truth, will decree according to the justice and verity of the fact, *Churchill v. Hobson*, 1 P. Wms. 241:" per Lord Keeper Henley, *Harden v. Parsons*, 1 Eden 145, at 147. See Story, J.'s, summary of the authorities in a note to 2 Spence, Eq. Jur. 952, collected from the judgments of Chancellor Kent in *Monell v. Monell*, 2 Johns. (Ch. N. Y.) 283, and *Clark v. Clark*, 8 Paige (N. Y.) 152. The note abridges Story, Eq. Jur. §§ 1283, 1284. *Brice v. Stokes*, 11 Ves. 319, 2 White & Tudor, L. C. in Equity (6th ed.), 967; *Hovey v. Blakeman*, 4 Ves. 592, at 608. As to what is acceptance of a trust, *Lewin, Trusts* (9th ed.), 211. In *Balchen v. Scott*, 2 Ves. 678, the executor had proved the will, which would now be deemed an acceptance of the trust. The powers and duties of administrators are summarized, 2 Kent. Com. 414. For the common law see Bac. Abr. Executors and Administrators.

cannot, and one executor can, *prima facie*, give a discharge ;¹ and

¹ *Charlton v. Lord Durham*, L. R. 4 Ch. 433; *Walker v. Symonds*, 3 Swanst. 1; *Lee v. Sankey*, L. R. 15 Eq. 204, distinguishes *Charlton v. Lord Durham*, *supra*, on the ground that though defendants were executors, they acted as trustees; *Magnus v. Queensland National Bank*, 37 Ch. Div. 466; 1 Wms. Executors (9th ed.), vol. 1. 816; *Shipbrook v. Hinchinbrook*, 11 Ves. 252, 16 Ves. 477. See, too, *Doe d. Stace v. Wheeler*, 15 M. & W. 623. But now by the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 20, the receipt in writing of one trustee is made a sufficient discharge. There is a curious case on the power of executors in Y. B. 4 H. VII. 4, pl. 8, where one of two executors in collusion with a debtor released him so that the assets of the estate were insufficient to meet its liabilities. The co-executor filed his bill against the debtor and the other executor. Archbishop Morton, the Chancellor, thought the case one proper for relief: "*Nullus recedat a curia cancellaria sine remedio.*" Fineux, counsel for the defendants, urged there was no remedy, since one executor had complete power over the estate. The Chancellor answers: "Sir, I know the law is, or ought to be, according to the law of God, and the law of God is, that an executor who is evilly disposed shall not expend all the goods, *et jeo seay bien si isaint soit et ne fuit amends* . . . *si il fuit de pouvoir, il serait damne in Hell.*"

Under the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 18, Position of there is no power of entering executors on the share register as executors; when executors entered they become shareholders, *Barton v. London and North Western Railway Company*, 24 Q. B. Div. 77; so that where one executor executed a transfer, forging the name of the other, and the transfer was registered by the company, such other was entered on company's register in respect of the estate of the testator. was not estopped from alleging that the transfer was invalid and the company had no right to accept a transfer executed by one only as valid. See to the same effect *Barton v. North Staffordshire Railway Company*, 38 Ch. D. 458, and *In re Ingham Jones v. Ingham* (1893), 1 Ch. 352. In *Muir v. City of Glasgow Bank*, L. R. 4 App. Cas. 337, Lord Penzance says, at 368: "It will not be doubted that a person who, in his capacity of trustee or executor, might choose to carry on a trade for the benefit of those beneficially interested in the estate, in the course of which trade debts to third persons arose, could not avoid liability on those debts by merely shewing that they arose out of matters in which he acted in the capacity of trustee or executor only, even though he should be able to shew, in addition, that the creditors of the concern knew all along the capacity in which he acted. The case of an agent who acts for others is, of course, entirely different. His contracts are the contracts of his principal; and the liabilities from which, as a general rule, he is personally exempt, fall upon his principal, who acted through him. But to exonerate a trustee something more is necessary beyond the knowledge of those who deal with him, that he is acting in that capacity, and it would not be sufficient in all cases to state that fact on the face of any contracts he may make. To exonerate him it would be necessary to shew that upon a proper interpretation of any contract he had made, viewed as a whole—in its language, its incidents, and its subject matter—the intention of the parties to that contract was apparent that his personal liability should be excluded; and that although he was a contracting party to the obligation the creditors should look to the trust estate alone." And, at 372, the learned Lord adopted the statement of the rule of liability by Lord President Inglis in the Court of Session (6 *Rettie* 392, at 399): "The rule of liability established by the case of *Lumsden v. Buchanan* may be stated in a single sentence. Persons becoming partners of a joint-stock company, such as the Western Bank, and being registered as such, cannot escape from the full liability of partners, either in a question with creditors of the company or in the way of relief to their co-partners, by reason of the fact that they hold their stock of the company in trust for others, and are described as trustees in the register of partners and the other books and papers of the company." In the case referred to (*Lumsden v. Buchanan*) Lord Westbury, C., says in the House of Lords (4 Macq. (H. L. Sc.) 950, at 955): "By the law of England, if an executor or trustee joins a partnership or company for the purpose of investing or employing usefully part of the estate of the testator or of the trust, he is personally liable for all the consequences of his engagement; for the law assumes, and rightly, that he depended on the condition of the assets or trust estate for his own security, and if he acted within the scope of his authority he is left to seek his indemnity from the trust estate or the beneficiaries." "An executor," says Lord Cairns, C., in *Buchan's Case*, L. R. 4 H. L. 549, at 588, "whose testator has held shares in a joint-stock company has generally one of two courses open to him. He may have the shares transferred into his own name, and become to all intents and purposes a partner in the company. He may, on the other hand, not wish to have the shares transferred into his name, and he ought in that case to have a reasonable time allowed him to sell the shares, and to produce a purchaser who will take a transfer of them." See also Lord Selborne's opinion at 594. Cp. the personal liability of receivers, see *post*, 1514.

that worked by the different operation of the Statute of Limitations;¹ and that, flowing from the historic circumstances of their origin, of the comparatively limited scope within which the executor's powers are to be exercised. The points of difference are, however, minute, while those of identity between the position of trustees and executors are constantly to be insisted on.

General principle of trustee's liability.

The most general principle to which questions of a trustee's liability are to be referred is stated by Jessel, M.R., in the Court of Appeal, in *Speight v. Gaunt*,² to be that "a trustee ought to conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own, and that beyond that there is no liability or obligation on the trustee. In other words, a trustee is not bound, because he is a trustee, to conduct business in other than the ordinary and usual way in which similar business is conducted by mankind in transactions of their own. It never could be reasonable to make a trustee adopt further and better precautions than an ordinary prudent man of business would adopt, or to conduct the business in any other way. If it were otherwise, no one would be a trustee at all. He is not paid for it. He says, 'I take all reasonable precautions, and all the precautions that are deemed reasonable by prudent men of business, and beyond that I am not required to go.'"³

Contention that the liability of a gratuitous trustee must be tested by the degree of care and prudence he uses in the management of his own private affairs.

The opinion has been advanced that the liability of a gratuitous trustee must ordinarily be tested by reference, not to an average standard, but to the degree of care and prudence which the particular trustee uses in the management of his own private affairs, "and the mandant ought to impute it to himself, that he made not choice of a more diligent person, which our custom follows, but still there must be *bonâ fides*."⁴ Wharton⁵ regards this as emanating from "the scholastic jurists and those that follow them." When the point came to be argued in the House of

¹ Trustee Act, 1888 (51 & 52 Vict. c. 59) s. 8; 2 Spence, Eq. Jur. 937-8; Godefroi, Trusts (2nd ed.) 712, 748.

² 22 Ch. Div. 727, at 739. See per Lord Blackburn in the same case in the House of Lords, 9 App. Cas. 1, at 19.

³ "There is one clear, homely, intelligible, but inflexible rule, which has never been departed from in times ancient or modern—viz., that a trustee is bound to act in the execution of his trust as a prudent man would in dealing with his own property": per Bacon, V.C., *Smethurst v. Hastings*, 30 Ch. D. 490, at 498; and there is no difference in degree of care, in regard to the conduct of the business of a trust, according to "whether there are persons to take in the future, or whether the trust fund is to be created for one beneficiary absolutely": per the Lord Chancellor (Halsbury), *Learoyd v. Whiteley*, 12 App. Cas. 727, at 732; nor whether the trust is voluntary or for valuable consideration: *Drosler v. Brereton*, 15 Beav. 221; nor whether those assuming to act as trustees are such in reality or not: *Backham v. Siddall*, 16 Sim. 297; nor whether the *cestui que trust* is known or unknown: *Ex parte Norris*, L. R. 4 Ch. 280.

⁴ *Stair, Inst.* 1, 12, 10, adopted by Lord President Inglis, Lord Justice-Clerk Moncreiff, and Lord Adam in *Rae v. Meek*, 15 Rettie 1033, reversed 14 App. Cas. 558.

⁵ *Negligence* (2nd ed.), § 516.

Lords,¹ Lord Watson² said that such a "rule, which is quite new to me, would be highly inconvenient in practice. In every case where neglect of duty is imputed to a body of trustees it would necessitate an exhaustive inquiry into the private transactions of each individual member—the interest of the trustee being to shew that he was a stupid fellow, careless in money matters, and that of his opponents to prove that he was a man of superior intelligence and exceptional shrewdness." And in the subsequent case of *Rae v. Meek*,³ Lord Herschell, speaking of *Learoyd v. Whiteley*⁴ and *Knox v. Mackinnon*,⁵ said: "I think these cases establish that the law in both countries" (i.e., England and Scotland) "requires of a trustee the same degree of diligence that a man of ordinary prudence would exercise in the management of his own affairs;" and this test may therefore now be regarded as authoritative.

"By accepting a trust," said Lord Hardwicke, "a person is obliged to execute it with fidelity and reasonable diligence; and it is no excuse to say that they (*sic*) had no benefit from it, but that it was merely honorary;"⁶ and as authority he cited the words of Holt, C.J., in *Coggs v. Bernard*:⁷ "For though he (the trustee) was not bound to enter upon the trust, yet, if he does enter upon it, he must take care not to miscarry, at least by mismanagement of his own."

There is a distinction⁸ that must be noted between people of the class we are now considering and skilled workers; since the skilled worker must be an expert in his specialty; while a trustee is only expected to be a good business man in general, with judgment to select those who must act for him in matters requiring special faculties. Yet though a trustee is not required to shew the knowledge of an expert in the business of the trust, his acceptance of it obliges him to the discharge of its duties with adequate care and prudence.

In *Wilson v. Lord Bury*,⁹ Brett, L.J., comments on the following passage from Story on Contracts:¹⁰ "A trustee is bound to

Duty undertaken by accepting a trust.

Trustee not bound to special diligence

Brett, L.J.'s comment on Story, in *Wilson v. Lord Bury*.

¹ *Knox v. Mackinnon*, 13 App. Cas. 753.

² *L. c.* at 766.

³ 14 App. Cas. 558, at 569. See also *In re Salmon*, *Priest v. Uppleby*, 42 Ch. D. 351; *Carruthers v. Cairns*, 17 Rettie 769; *Crabbe v. Whyte*, 18 Rettie 1065.

⁴ 12 App. Cas. 727, at 733.

⁵ 13 App. Cas. 753.

⁶ *Charitable Corporation v. Sutton*, 2 Atk. 400, at 406. Lord Hardwicke referred to *Ayliffe v. Murray*, 2 Atk. 60, where a deed obtained from a *cestui que trust* by executors and trustees securing them remuneration as a condition of their acting under the will was set aside on the ground that trusts are honorary, "and there is a strong reason, too, against allowing anything beyond the terms of the trust, because it gives an undue advantage to a trustee to distress a *cestui que trust*." See in *Briggs v. Spaulding*, 141 U. S. (34 Davis), 132, the dissentient opinion of Harlan, J., at 171.

⁷ 1 Salk. 26.

⁸ Wharton (2nd ed.), *Negligence*, § 515.

⁹ 5 Q. B. Div. 518, at 527.

¹⁰ § 297.

perform all acts which are necessary for the proper execution of his trust. But by the English rule, as he is not allowed compensation for his services, he would stand in the position of a gratuitous bailee, and be responsible only for losses or improper execution of his trust in cases of gross negligence." The Lord Justice remarks on this: "It may be, perhaps, noticed that in this passage, if the analogy be correct, gross negligence is the neglect of taking the same care, which a person of ordinary prudence and skill would take of his own similar affairs."

Prudence, not skill, the test of diligence.

Trustee not permitted to act beyond the terms of his trust.

May follow usual course of business.

This, then, is the test—not a consideration of skill but of prudence.

Another limitation must be regarded when considering the range within which a trustee is to act. He must not do acts other than those which the terms of his trust permit, though they may be such as would be done by an ordinary prudent man of business or advised by a specialist.¹ On the other hand, when there is a usual course of business within the scope of the trustee's powers, he is justified in adopting it, though there may be some risk of losing the property by the dishonesty or insolvency of an agent employed in ordinary course.² It results from the nature of a trustee's liability—from the fact that his diligence is to be that of a good business man and not that of a specialist—that he is authorized to employ agents of competent skill in the conduct of any business of the trust requiring the exercise of special knowledge or faculties whenever such employment is according to the usual course of business; though, since the duty he has undertaken involves discretion, he must not shift the responsibility of acting upon any other person.³

Responsibility of agent employed by trustee.

An agent employed in any business of the trust is responsible to the trustee and not to the *cestuis que trust*, unless such agent was employed also by the *cestuis que trust* or on their behalf; for the agent's duty arises out of the contract alone and is limited by its terms. Lord Herschell, however, notes⁴ that "there may be cases where, if trustees failed to call to account those who were under liability in respect of acts injurious to the trust estate, the beneficiaries might compel them to do so, or even enforce the right themselves." Such cases must be very rare. It may be convenient here to consider the circumstances of their possible occurrence.⁵

¹ *Billing v. Brogden*, 38 Ch. Div. 546; *Pride v. Fooks*, 2 Beav. 430, at 440.

² *Ex parte Belchier*, per Lord Hardwicke, Amb. 218; *Speight v. Gaunt*, 9 App. Cas. 1; *Magnus v. Queensland National Bank*, 36 Ch. D. 25, 37 Ch. Div. 466.

³ *Turner v. Corney*, 5 Beav. 515; *Adams v. Clifton*, 1 Russ. 297.

⁴ *Rae v. Meek*, 14 App. Cas. 558, at 569.

⁵ As to what Lord Herschell says about beneficiaries compelling trustees to take action, see Lewin, *Trusts* (9th ed.), 97; R. S. C. (1883), Order xvi. r. 11.

"*Prima facie*," says Lindley, L.J.,¹ "the only persons to sue an agent are his principals; although, no doubt, it might be shewn that an agent was so involved in a breach of trust committed by his principal as to stand in the position of a *quasi* trustee, and in that case an action might be supported against him." That is, where the agent by his conduct has in effect ceased to be agent and become in the position of a trustee he becomes liable to the same proceedings to which a trustee is exposed. Lord Langdale in *Attorney-General v. Corporation of Leicester*² indicates a state of facts that may serve to illustrate the rule stated by Lindley, L.J.: "If the agent of a trustee, whether a corporate body or not, knowing that a breach of trust is being committed, interferes and assists in that breach of trust, he is personally answerable, although he may be employed as the agent of the person who directs him to commit that breach of trust." In other words, he is a joint tortfeasor and liable as such.³

Where agent may be made responsible to *cestui que trust*. Rule stated by Lindley, L.J.

Lord Langdale, M.R., in *Attorney-General v. Corporation of Leicester*.

But the cases alluded to by Lord Herschell are not of this class, as liability attaches by virtue of the person charged ceasing to be a mere agent, and being clothed with a more onerous capacity. They seem rather to be in the nature of special exceptions to the rule, and to be referable to that principle of equity which requires its decisions to be regulated *secundum æquum et bonum*,⁴ and are not strictly recognised defections from any rule. Turner, V.C., shews this when he says: "The cases, I think may be considered to go to this extent, that such a bill" (*i.e.*, a bill by *cestuis que trust* against a defendant liable only at law on a contract to which the *cestui que trust* are not parties) "may be supported in all cases where the relation between the executors and the surviving partners is such as to present a substantial impediment to the prosecution by the executors of the rights of the parties interested in the estate against the surviving partners." The law as thus laid down is recognised in Lord Selborne's judgment in the Privy Council case of *Beningfield v. Baxter*,⁵ and may be considered settled on the footing that as a rule the *cestui que trust* is not entitled to sue an agent of the trust whose sole relation is with the trustee; but the Court has power to enable him to sue where otherwise injustice would be worked; while in granting the dispensation in favour of the *cestui que trust* the Court is very strict and

Opinion of Turner, V.C.

Adopted by Lord Selborne in *Beningfield v. Baxter*.

¹ *In re Spencer*, 51 L. J. Ch. 271, at 273.

² 7 Beav. 176, at 179. Cp. *Fyler v. Fyler*, 3 Beav. 550.

³ *Ante*, 200 n. 1.

⁴ Story, Eq. Jur. § 34

⁵ *Travis v. Milne*, 9 Hare 141.

⁶ 12 App. Cas. 167, at 178.

requires to be shewn circumstances of disability for suing and not a mere refusal to sue by the trustee.¹

Trustee
bound to use
his own skill
and judgment.

In any event, the trustee is personally bound to use his own skill and judgment, and may not rest upon the untested advice of those whose assistance he has invoked, whatever their skill may be. If he chooses to place reliance upon such advice without testing its soundness, he cannot escape personal liability if things go wrong, unless he can shew that the circumstances are such as would justify a trustee of ordinary prudence, and fully informed on the character of the proposed transaction, in entering upon it.²

If the trustee
uses the
means he has
to test the
skilled advice
given him, he
is protected.

If the trustee uses such means of judgment as he has to test the advice of the skilled person to whom he has referred any business, he will be protected in the event of an unfavourable issue.³ He must not abdicate the exercise of his own judgment by an implicit reliance on the reports of his agents, however qualified they may be.⁴ Neither must he employ an unskilful agent, or even a skilful agent in circumstances that are not within the ordinary line of his business. "Suppose," says Kay, J.,⁵ "that, in selling trust property or changing an investment, trustees were to allow the trust fund to pass into the hands of their solicitors, and that it was lost in consequence, they would be liable. . . . It would be no excuse to say, as one of the witnesses said in this case, 'Solicitors often do so.' The question is not what they often do, but what is properly within the scope of their employment as solicitors."⁶ No stronger case could be given of this limitation of the rule—that trustees acting according to the ordinary course of business, and employing agents as a prudent man of business would do on his own behalf, are not liable for the default of an agent so employed—than the case cited in the course of this judgment by Kay, J., where

¹ *Yeatman v. Yeatman*, 7 Ch. D. 210; see judgment of Kay, J., *Meldrum v. Scorer*, 56 L. T. 471. In *Sharpe v. San Paulo Railway Company*, L. R. 8 Ch. 597, at 609, James, L.J., says: "I came to the conclusion very clearly that a person interested in an estate or a trust fund could not sue a debtor to that trust fund, or sue for that trust fund, merely on the allegation that the trustee would not sue; but that if there was any difficulty of that kind, if the trustee would not take the proper steps to enforce the claim, the remedy of the *cestui que trust* was to file his bill against the trustee for the execution of the trust."

² *Learoyd v. Whiteley*, 12 App. Cas. 727; *Sutton v. Wilders*, L. R. 12 Eq. 373; *In re Weall*, *Andrews v. Weall*, 42 Ch. D. 674; *In re Somerset*, *Somerset v. Earl Poulett* (1894), 1 Ch. 231; *Speight v. Gaunt*, 9 App. Cas. 1, distinguished in *Bullock v. Bullock*, 56 L. J. Ch. 221; *Maclean v. Soady's Trustee*, 15 Rettie 966; *Rae v. Meek*, 15 Rettie 1033, reversed 14 App. Cas. 558.

³ *Speight v. Gaunt*, 9 App. Cas. 1.

⁴ *Learoyd v. Whiteley*, 12 App. Cas. 727.

⁵ *Fry v. Tapson*, 28 Ch. D. 268, at 280; *In re Partington*, *Partington v. Allen*, 57 L. T. 654.

⁶ This case, put by Kay, J., is very like the Scotch case of *Knox v. Mackinnon*, 13 App. Cas. 753, see per Lord Watson, at 767. 1

trustees were held liable for taking a competent London surveyor to value property at Broadstairs,¹ on the ground that, though competent, he was unacquainted with the place. This case is, however, now no longer law.²

The duty of the Court in those cases where there is a question of nicety as to construction or otherwise is to lean to the side of the honest trustee, and not to be anxious to find fine and extraordinary reasons for fixing him with any liability upon the contract. "You are," said Jessel, M.R.,³ "to endeavour as far as possible, having regard to the whole transaction, to avoid making an honest man who is not paid for the performance of an unthankful office liable for the failure of other people from whom he receives no benefit."

Moreover, it is a rule in equity, that in all matters of trust or in the nature of a trust, the trustee is not entitled to any remuneration for any extraordinary trouble he may have had in the business entrusted to him; for if the trustee were allowed to charge for his services his interest would be opposed to his duty, and the Court will not allow a trustee to place himself in a false position.⁴ But when extraordinary expense is incurred by the trustee for the benefit of the estate, the estate must defray it.⁵ "It is in the nature of the office of a trustee, whether expressed in the instrument or not, that the trust property shall reimburse him all the charges and expenses incurred in the execution of the trust."⁶

Neither is it in every case that the propriety of employing an agent⁷ can be established; yet this is the first step for the exoneration of the trustee. "Generally speaking," said Sir John Leach, M.R., in *Weiss v. Dill*,⁸ "executors are not allowed to

Court to lean to the side of the honest trustee.

Trustee not entitled to remuneration.

Where trustee may employ an agent.

¹ *Budge v. Gummow*, L. R. 7 Ch. 719.

² 56 & 57 Vict. c. 53, s. 8 (1).

³ *Speight v. Gaunt*, 22 Ch. Div. 727, at 746.

⁴ *Robinson v. Pett*, 3 P. Wms. 249, 2 White and Tudor, L. C. in Equity, 214. Cp. ante

⁵ In the matter of *Ormsby*, a minor, 1 Ball. & B. (Ir. Ch.) 189.

⁶ Per Lord Eldon, C., *Worrall v. Harford*, 8 Ves. 4, at 8.

⁷ *In re Partington*, *Partington v. Allen*, 57 L. T. 654. So long as the agent acts merely as agent, generally speaking he cannot be held liable as constructive trustee unless he assist with knowledge in a dishonest and fraudulent design on the part of the trustees: *Barnes v. Addy*, L. R. 9 Ch. 244, per Lord Selborne, C., at 252; but where the agent obtains possession of the trust funds and acts otherwise than in strict conformity with his duty as agent, he thereby charges himself as trustee: *Lee v. Sankey*, L. R. 15 Eq. 204, per Bacon, V.C. at 211; *In re Barney*, *Barney v. Barney* (1892), 2 Ch. 265; there was a difference of opinion of the Court in *Soar v. Ashwell* (1893), 2 Q. B. 390, as to the ground of the decision, but none as to the decision itself: see per Bowen, L.J., at 396, and per Kay, L.J., at 405.

⁸ 3 My. & K. 26, the case of executors employing an agent for collecting debts in the testator's business of a tailor. The collector charged 5 per cent. The master allowed only 2½ per cent. in the executors' account. See, however, *Brier v. Evison*, 26 Ch. Div. 238. As to the trustee's responsibility for the intelligence and honesty of his agents, *In re Weall*, 42 Ch. D. 674. In *Henderson v. M'iver*, 3 Madd. 275, an executor was held justified in employing an accountant. See also *Macnamara v. Jones*, 2 Dick. (Ch.) 587.

employ an agent to perform those duties which, by accepting the office of executors, they have taken upon themselves; but there may be very special circumstances in which it may be thought fit to allow them such expenses as they may have incurred by the employment of agents." Courts of Equity, however, stepped in where an agent was employed in special circumstances, and held that the trustee, having established the propriety of employing an agent, should be exonerated from loss unless guilty of wilful default.

22 & 23 Vict.
c. 35, s. 31.

Effect stated
by Lord
Selborne, C.

The Act 22 & 23 Vict. c. 35, s. 31, first gave statutory sanction to the rule authorizing the employment and payment of an agent by the trustee in the case of "any banker, broker, or other person with whom trust-moneys have been deposited." The effect of this enactment is stated by Lord Selborne, C.,¹ to be that "it does not substantially alter the law as it was administered by Courts of Equity, but gives it the authority and force of statute law, and appears to me to throw the *onus probandi* on those who seek to charge an executor or trustee with a loss arising from the default of an agent when the propriety of employing an agent has been established."

Trustee Act,
1893.

This is now repealed by the Trustee Act, 1893,² under section 17 of which a trustee may appoint:

(1) A solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, and by permitting him to have the custody and to produce any such deed as is referred to in section 56 of the Conveyancing and Law of Property Act, 1881;³

(2) A banker or solicitor to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of insurance by permitting him to have the custody of and to produce the policy of assurance with a receipt signed by the trustee.

But the trustee will be liable if he allows any money or property to remain in the hands or under the control of the banker or solicitor for a longer period than is reasonably necessary to pay over the same to the trustee.⁴

Trustee's
accountability
for property
rightly in the
hands of
agent.

We have seen⁵ that a trustee is not accountable for property rightly in the hands of an agent when the Court has come to the

¹ *Brier v. Evison*, 26 Ch. Div. 238, at 243.

² 56 & 57 Vict. c. 53, s. 17, *Re Hetling and Merton* (1893), 3 Ch. 269. *In re Bellamy v. Metropolitan Board of Works*, 24 Ch. D. 387, was overruled by sec. 2 of 51 & 52 Vict. c. 59, for which the present sec. is substituted; *In re Flower*, 27 Ch. D. 592; *Day v. Woolwich Equitable Building Society*, 40 Ch. D. 491.

³ 44 & 45 Vict. c. 41.

⁴ *In re Fryer*, 3 K. & J. 317; *Cann v. Cann*, 51 L. T. 770; *Lewin, Trusts* (9th ed.) ch. 14 s. 2.

⁵ *Ante*, 1482.

conclusion that there was reason for the employment of an agent.¹ This ground of exoneration is dependent on the reasonableness of the action of the trustee. A comparison of the cases of *Clough v. Bond*² and *Johnson v. Newton*³ will mark both the limits and the reason of the rule.

In the former case, on the death of an intestate, administration *Clough v. Bond.* was granted to her son and married daughter. The assets were

paid into a banking account in the joint names of the son and of the daughter's husband. Seven months after, the daughter's husband died; ten months after that, the son drew out the balance, applied it to his own use, and absconded. The Lord Chancellor, affirming the Vice-Chancellor, held that the personal representatives of the husband were liable, because he had deposited the money in the two names, and thus excluded his wife from ever having control—a mode of deposit by which, without necessity, exclusive possession was likely to vest in a person not entitled to it. When the money was thereby lost the impropriety of so placing it imposed a liability upon the estate of those to whom the loss was imputable.⁴ The Lord Chancellor expressed the general principle⁵ to be "that, although a personal representative, acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it, yet, if that line of duty be not strictly pursued, and part of the property be invested by such personal representative in funds or upon securities not authorized, or put within the control of persons who ought not to be entrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper

Judgment of
the Lord
Chancellor.

¹ *Edmonds v. Peake*, 7 Beav. 239, the case of an auctioneer; *Williams v. Higgins*, 17 L. T. (N. S.) 525; *In re Bird*, L. R. 16 Eq. 203, the case of money sent to a solicitor to make a payment, which was misappropriated.

² 3 My. & Cr. 490; *Newton v. Hallett*, 19 L. T. (N. S.) 472; *Gasquoine v. Gasquoine* (1894), 1 Ch. 470.

³ 11 Hare 160.

⁴ *Salway v. Salway*, 2 Russ. & My. 215, in the House of Lords, *sub nom.* *White v. Baugh*, 9 Bligh (N. S.) 181, is the converse case, where the House of Lords, affirming Lord Brougham and overruling Sir John Leach, M.R., held that in the event of loss a trustee will be liable who parts with his *exclusive* control of trust funds by associating with himself some other person not a member of the trust, or leaves funds in the exclusive control of a co-trustee; *Mendes v. Guedalla*, 2 J. & H. 259; *Lewis v. Nobbs*, 8 Ch. D. 591. *Cp. Kilbee v. Sneyd*, 2 Moll. (Ir. Ch.) 186. As to a possible difference in the case of an executor from a trustee, see *Pemberton v. Chapman*, E. B. & E. 1056; *quære*, would not the providing for drawing cheques *singly* by either executor be an act of negligence? *Consterdine v. Consterdine*, 31 Beav. 330.

⁵ 3 My. & Cr. at 496.

motive.”¹ “So when the loss arises from the dishonesty or failure of any one to whom the possession of part of the estate has been entrusted, necessity, which includes the regular course of business in administering the property, will in equity exonerate the personal representative.² But if, without such necessity, he be instrumental in giving to the person failing possession of any part of the property, he will be liable, although the person possessing it be a co-executor or co-administrator.”³

Johnson v.
Newton.

Johnson v. Newton⁴ was the case of executors maintaining a balance of more than £2000 at a bank nine months after their testator's death; of which sum more than £1000 was lost to the estate by the bankruptcy of the bankers. The Master held that it was not necessary to retain the balance or any part of it at the banker's; but the Vice-Chancellor⁵ held the executors not liable for the loss, since there was a rule of law that allowed them a year to wind up their testator's estate;⁶ while there were no directions to invest the balance of the estate, failing which, had they done so, they would have been liable to the residuary legatee for any loss on a re-sale. “The executors are no doubt bound to exercise their judgment on the safety of the place of deposit, whether it be that which the testator had in his lifetime chosen, or whether it be selected by themselves; and when a loss unfortunately happens, the question must always be, how far the executors must be held to be answerable under the circumstances of the case.”⁷

Matthews v.
Brise.

Matthews v. Brise,⁸ before Lord Langdale, M.R., illustrates the rule in both its aspects. A trustee was there held to have properly invested trust-money in Exchequer bills pending necessary delay in the completion of a mortgage, but was held personally liable for having left the bills bought in the hands of a broker who misapplied them.⁹

¹ Cp. Phillips v. Phillips, Freem. (Ch.) 11, Rep. temp. Finch, 410, 1 Ch. Cas. 202. Where an executor is negligent and does not exercise ordinary care, he is personally liable for the loss of money belonging to the estate, by the theft of the same from his person by pickpockets whilst travelling upon a street car: Tarver v. Torrance, 12 Am. St. R. 311, where there is a note on the skill and diligence required of an administrator; *In re Brogden*, Billing v. Brogden, 38 Ch. Div. 546, per Cotton, L.J., at 567.

² This sentence is slightly altered from the report, where a full stop is inserted after “entrusted.”

³ Citing Langford v. Gascoyne, 11 Ves. 333; Lord Shipbrook v. Lord Hinchinbrook, 11 Ves. 252, 16 Ves. 477; Underwood v. Stevens, 1 Meriv. 712. The reporter in 3 My. & Cr. at 497, adds: “See Hanbury v. Kirkland, 3 Sim. 265.” The matter is well dealt with by Story, Eq. Jur. § 1269 and notes. A trustee is not liable upon a proper investment in English Government securities for loss through fluctuations of the fund: Peat v. Crane, 2 Dick. (Ch.) 499 n. If the investment is unauthorized he is liable: Hancom v. Allen, 2 Dick. (Ch.) 498; Howe v. Earl of Dartmouth, 7 Ves. 137, at 150, 2 White & Tudor L. C. in Equity (6th ed.), 321. ⁴ 11 Hare 160.

⁵ Page Wood, V.C.

⁶ Brooke v. Lewis, 6 Madd. 358.

⁷ Per Page Wood, V.C., Johnson v. Newton, 11 Hare, at 167. ⁸ 6 Beav. 239.

⁹ Lunham v. Blundell, 4 Jur. N. S. 3; Wilkinson v. Bewick, 4 Jur. N. S. 1010.

If a trustee pays money to his own account with a banker, and it is lost, he is personally liable,¹ even in cases where it would have been equally lost had it been placed to a separate account; for by so doing, in the event of his bankruptcy, it would go to the credit of his estate, and if the bankers had any account with him for set-off they could claim the *cestui que trust's* funds.²

Money lost by being paid to trustee's own account.

Though trust funds may be kept in a separate account, yet, if left standing at the bank too long, and thereby lost, the trustee becomes personally liable. Where to draw the line between proper and improper detention is, as is observed by Kay, J.,³ "extremely difficult" to determine. Where £500 was left in a bank for fourteen months while trustees looked for a mortgage, at the end of which time the bank failed, it was held by that learned judge "that leaving that money in the bank for fourteen months was leaving it there too long," so that the trustees were personally responsible.

Trust funds left at the bank too long and lost.

"There has been no case referred to," says Bacon, V.C., in *Youde v. Cloud*,⁴ "and, according to my experience, my belief is that no case can be found, in which a trustee, however formally he may have been appointed, however extensive may have been the powers that were conferred upon him, has been held liable for the non-performance of a trust of which he was ignorant; and I should be very much surprised to find that any such case had ever occurred, or that any such decision had ever been pronounced against a trustee in such circumstances."

Trustee not liable for non-performance of a trust of which he is ignorant.

Where there are partners, one of whom is a trustee who brings trust-moneys into the firm's assets with the knowledge of the others, which is misapplied, the Court holds them all liable as trustees.⁵

Trustee paying trust funds into partnership.

It must be borne in mind that a trustee is not an agent. An agent represents and acts for his principal, and when he so contracts the principal is bound, but the agent is not. When a

Trustee not an agent.

¹ It is a well-established doctrine of the Court of Chancery that if a trustee or agent mixes and confuses the property which he holds in a fiduciary character with his own property, he is, *prima facie*, liable for the whole, and the *onus* will consequently be on him to discriminate: *Lupton v. White*, 15 Ves. 432; *Cook v. Addison*, L. R. 7 Eq. 466. As to the distinction between debtor and creditor and trustee and *cestui que trust*, see *Lister v. Stubbs*, 45 Ch. Div. 1.

² *Wren v. Kirton*, 11 Ves. 377. As to following trust-money, see *In re Hallett's Estate*, *Knatchbull v. Hallett*, 13 Ch. D. 696, especially the judgment of Jessel, M.R. Lord Eldon's decision certainly seems a hard one, as a general rule, since the loss from the bankruptcy of the trustee may be more unlikely than the bankruptcy of the banker. In the case in question both seem to have been unable to meet their liabilities. Cp. *Billing v. Brogden*, 38 Ch. Div. 546.

³ *Cann v. Cann*, 51 L. T. 770.

⁴ L. R. 18 Eq. 634, at 642.

⁵ *Ex parte Watson*, 2 Ves. & B. 414; *Eager v. Barnes*, 31 Beav. 579; *Alliance Bank v. Tucker*, 17 L. T. (N. S.) 13; *Blyth v. Fladgate* (1891), 1 Ch. 337.

trustee contracts, unless he is bound, there is no one bound, since he has no principal; the contract is therefore his personal contract, but with power to the trustee to resort to the trust funds for his exoneration. If, then, a trustee wishes to protect himself from personal liability he must do so by distinctly contracting that the other party to the contract is to look exclusively to the trust estate,¹ and we have already seen² that it is an established rule that a trustee, executor, or administrator of a trust estate shall have no allowance for his care and trouble.³

Effect of clause
exonerating
from liability
for errors,
omissions, or
neglect, &c.

The effect of a special clause in a trust deed, exonerating trustees from liability "for omissions, errors, or neglect of management," or for the inefficiency of securities, insolvency of debtors, or depreciations of securities, and other like casualties, has yet to be considered. "Such a clause," says Lord Watson in the House of Lords,⁴ and his expression of the law is adopted by Lord Herschell,⁵ "is ineffectual to protect a trustee against the consequences of *culpa lata*, or gross negligence, on his part, or of conduct which is inconsistent with *bona fides*. I think it is equally clear that the clause will afford no protection to trustees who, from motives however laudable in themselves, act in plain violation of the duty which they owe to the individuals beneficially interested in the funds which they administer." "Clauses of this kind do not protect against positive breach of duty."⁶

Costs.

The general rule as to costs is, that where one interested in an estate resorts to the Court of Chancery for an account of that estate, the costs fall on the estate; "for executors usually are to be exempted from paying costs; and this rule holds even in cases where great delays and difficulties have been occasioned by the executor; for the Court will overlook these circumstances if it can."⁷

Having thus considered the general principles of law applicable to the acts and default of trustees, we are now to treat of the more special applications of it, and—

¹ Taylor v. Davis, 110 U. S. (3 Davis) 330, at 335. ² Ante, 1483.

³ Robinson v. Pett, 3 P. Wms. 249, 2 White & Tudor, L. C. in Equity (6th ed.), 214; *In re Barber* (1886), 34 Ch. D. 77, where it was held on this principle, that when the lessor has refused to grant a renewal of a lease to the *cestui que trust*, he will yet be entitled to the benefit of any renewal the trustee may have obtained. See *Keech v. Sandford*, Sel. Cas. in Ch. 61 (Macnaghten's ed.), 195; *Tanner v. Elworthy*, 4 Beav. 487.

⁴ *Knox v. Mackinnon*, 13 App. Cas. 753, at 765. For a curious case of "aberr unreasonableness" of a trustee who was in consequence ordered to pay the costs of legal proceedings taken by *cestui que trust*, see *In re Chapman*, *Freeman v. Parker*, 11 Times L. R. 177 (C. A.).

⁵ *Rae v. Meek*, 14 App. Cas. 558, at 572.

⁶ *Seton v. Dawson*, 4 Dunlop, 310, per Lord Ivory, at 318. Cp. *Kennedy v. Kennedy*, 12 Rettie, 275.

⁷ Per the Lord Chancellor, *Hall v. Hallett*, 1 Cox (Ch.) 134, at 141. For a more particular statement of the law, see 2 Wms. Executors (9th ed.), 1862, *Godefroi, Trusts* (2nd ed.), 807, and R. S. C. 1883, O. lxx. r. 1; but see *Judicature Act 1890* (53 & 54 Vict. c. 44), s. 5.

I. As to the position of a trustee with regard to the custody of trust property.¹ I. Custody of trust property.

It was laid down in *Crosse v. Smith*² by Lord Ellenborough that an executor is liable at law for the loss of his testator's assets, when they have once come into his hands, either by fire, robbery, or by any of the various means which afford excuse to ordinary bailees and agents in cases of loss without negligence. The rule of equity was always otherwise, and was thus stated by Lord Hardwicke:³ "If a trustee is robbed, that robbery, properly proved, shall be a discharge, provided he keeps them [the trust funds] so as he would keep his own. So it is as to an executor or administrator, who is not to be chargeable further than goods come to his hands; and for these not to be charged unless guilty of a *devastavit*; and if robbed, and he could not avoid it, he is not to be charged, at least in this court."

Variance between the common law and chancery doctrines.

If Lord Ellenborough's decision ever correctly expressed the rule of law, which is doubtful,⁴ it now no longer does so, by virtue of the Judicature Act, 1873⁵—providing that, in case of a conflict between the rules of equity and the rules of law, the rules of equity are to prevail—and the law may be taken as settled according to the view of Lord Hardwicke, that an executor, or administrator, or trustee has no more extensive liability than a bailee (whether gratuitous or not makes no difference),⁶ who cannot be charged with the loss of his testator's assets without negligence or default.⁷ And if any goods are stolen from the possession of any of the class of persons whose liability we are now considering, or from the possession of a third person to whose custody they have been delivered by any person affected with a trust of them, or are lost by casualty, as by accidental fire, the person so affected with a trust of them

Effect of the Judicature Act, 1873.

¹ The duty to protect trust property is treated at large in Godefroi, *Trusts* (2nd ed.), 254. "The clear principle of equity is that if a trustee has made use of the trust property, the *cestui que trust* has an option to have the profit actually made or interest." Per Lord Eldon, C., *Ex parte Watson*, 2 Ves. & B. 414.

² 7 East 246.

³ *Jones v. Lewis*, 2 Ves. Sen. 240; *Morley v. Morley*, 2 Cas. in Ch. 2; *Knight v. Lord Plimouth*, 3 Atk. 480, decides the same point as to a receiver appointed by the Court; *Rowth v. Howell*, 3 Ves. 565. "Nor will the Court ever charge a trustee with imaginary values, but he shall be charged as a bailiff only. And although very supine negligence might indeed in some cases charge a trustee with more than he had received, yet the proof must be then very strong": 2 Fonbl. Eq. (5th ed.), 178; *Story, Eq. Jur.* § 1269.

⁴ *Coggs v. Bernard*, 2 Lord Raym. 909, per Holt, C.J., at 913: "If he keeps the goods in such a case with an ordinary care, he has performed the trust reposed in him."

⁵ 36 & 37 Vict. c. 66, s. 25, sub-s. 11.

⁶ *Charitable Corporation v. Sutton*, 2 Atk. 400, at 406; *Jobson v. Palmer* (1893), 1 Ch. 71.

⁷ *Job v. Job*, 6 Ch. D. 562; *Mayer v. Murray*, 8 Ch. D. 424, explained and followed *In re Symons*, *Luke v. Tonkin*, 21 Ch. D. 757. In all these cases a claim was made in respect of "wilful default." As to wilful default, see *Lewin, Trusts* (9th ed.), 1034; *Godefroi, Trusts* (2nd ed.), 789.

shall in the absence of negligence or default not be charged with their loss.

Neglect of trustee to insure.

There is a decision of Alderson, B.,¹ that an executor is not liable for neglect to insure when a fire happens and destroys his testator's property. This is usually cited as settling the law on this point.² On examination it will be seen that, in the particular case, a business was in the possession of two persons as partners, and on the death of the one the insurance was not renewed, the other being interested in the matter of the insurance, and not renewing it. Alderson, B., treats this as "a material circumstance." He says: "It would be a strong thing to say (he as a reasonable man, and taking reasonable care of his own property, not doing it)—it would be a strong thing to say that these parties were guilty of wilful default in omitting to do what Barlow himself [the surviving partner] might have done." This is the ground on which the case is decided.

Suggested distinction.

Other authorities, it is true, dealing with life and not with fire policies, hold an executor or trustee who drops a policy liable to the beneficiaries.³ The question seems really to turn on what, in the existing state of opinion, and with reference to contemporary modes of life, is the reasonable thing to do; and whatever may have been the case in the year 1840, it would be a hard saying at the present day, and with the immensely diminished rate of insurance, to affirm that a prudent business man would not insure his property.⁴

Trustees guilty of breach of trust, each liable for the whole loss.

Where trustees are guilty of breach of trust, each trustee is responsible for the whole loss sustained in consequence of their collective negligence, and execution may be issued against any one of them singly;⁵ and there is no difference in liability whether

¹ *Bailey v. Gould*, 4 Y. & C. (Ex.) 221. See *Fry v. Fry*, 27 Beav. 146. *Ex parte Andrews*, 2 Rose 410, and *Dobson v. Land*, 8 Hare 216, are cited for the general proposition, but they are very special in their facts.

² *E.g.*, 2 Wms. Exors. (9th ed.), 1704, note (x).

³ *Garner v. Moore*, 24 L. J. Ch. 687; *Marriott v. Kinnersley*, 1 Tamlyn 470; but only if he has or can procure funds, *Hobday v. Peters* (No. 3), 28 Beav. 603.

⁴ In *Fry v. Fry*, 27 Beav. 144, at 146, Lord Romilly, M.R., refused to charge executors personally with the consequence of not keeping up a policy of insurance of a house. The premium on the policy became due on the 25th of March; the testator died on the 27th of March; and the house was destroyed by fire on the 26th May in the same year. Executors have been held personally liable on a covenant to repair where an uninsured leasehold house the property of their testators was destroyed by fire, *Tremeere v. Morison*, 1 Bing. N. C. 89; *Sleap v. Newman*, 12 C. B. (N. S.) 116, and the judgment of Smith, J., in which all the cases are collected, in *Rendall v. Andrew*, 61 L. J. Q. B. 630. By the Trustee Act 1893 (56 & 57 Vict. c. 53) s. 18, a trustee may insure up to three-fourths of the value of the property and pay the premiums out of the income of the trust funds without the consent of the beneficiary. *Lady Croft v. Lyndsey*, Freem. (Ch.) 1, is the case of houses destroyed in the fire of London, where the administrator was relieved in Equity. There is a note to the report referring to Lord Ellenborough's dictum in *Crosse v. Smith*, 7 East 246, at 255, which is not now law, see *Job. v. Job*, 6 Ch. D. 562, per Jessel, M.R., at 564. *Ante*, 600.

⁵ *Ex parte Shakeshaft*, 3 Bro. C. C. 197; *Ex parte Norris*, L. R. 4 Ch. 280.

the loss arises from a mere default of the trustee, or is occasioned by an act, whether it is attributable to nonfeasance or misfeasance.¹

In one case the trustee has a remedy over against his *cestui que trust*, namely when he is compelled to replace trust funds which have been lost through his breach of trust in making an improper investment, to which he has been induced by the *cestui que trust*. The law is expressed by Turner, L.J.:² "It seems to me to be the necessary consequence of the *cestuis que trust* for life having received the income of the trust fund unduly invested, that the trustees have a right to be indemnified as against the *cestuis que trust* for life, or their estates to the extent to which those estates have been benefited by the improper investment." This right has, however, been limited to the case where the *cestui que trust's* interest was in possession, and where a personal benefit had been received from the investment.³

Cestui que trust receiving benefit from unauthorized investment must indemnify trustee.

The general principle thus expressed received statutory recognition by s. 6 of the Trustee Act, 1888,⁴ which was re-enacted by s. 45 of the Trustee Act, 1893.⁵ "In order to bring a case within this section the *cestui que trust* must instigate, or request, or consent in writing to some act or omission which is itself a breach of trust, and not to some act or omission which only becomes a breach of trust by reason of want of care on the part of the trustees. If a *cestui que trust* instigates, requests, or consents in writing to an investment not in terms authorised by the power of investment, he clearly falls within the section; and in such a case his ignorance or forgetfulness of the terms of the power would not, I think, protect him—at all events, not unless he could give some good reason why it should, e.g., that it was caused by the trustee. But if all that a *cestui que trust* does is to instigate, request, or consent in writing to an investment which is authorised by the terms of the power, the case is, I think, very different. He has a right to expect that the trustees will act with proper care in making the investment, and if they do not, they cannot throw the consequences on him, unless they can shew that he instigated, requested, or consented in writing to their non-performance of their duty in this respect."⁶

Trustee Act, 1893, s. 45.

Lindley, L.J.'s explanation of the scope of the section.

¹ Devaynes v. Robinson, 24 Beav. 86.

² Raby v. Ridehalgh, 7 De G. M. & G. 104, at 110. See per Chitty, J., Sawyer v. Sawyer, 28 Ch. D. 595, at 598, affirmed 602; per Stirling, J., Blyth v. Fladgate (1891), 1 Ch. 337, at 363.

³ Morgan v. Blyth (1891), 1 Ch. 344, at 363.

⁴ 51 & 52 Vict. c. 59.

⁵ 56 & 57 Vict. c. 53.

⁶ Per Lindley, L.J., *In re Somerset, Somerset v. Earl Poulett* (1894), 1 Ch. 231, 265. The words "in writing" in s. 45 apply only to "consent," and not to "instigation" or "request": *Griffith v. Hughes* (1892), 3 Ch. 105, approved *In re Somerset* at 265. A married woman must be shewn to have acted for herself with knowledge of the facts, *Sawyer v. Sawyer*, 28 Ch. D. 595; see *Ricketts v. Ricketts*, 64 L. T. 263, explained in *Bolton v. Curre* (1895), 1 Ch. 544; *Mars v. Browne*, 11 Times L. R. 352. *Post*, 1509.

Trustees are liable who pay over funds on a forged authority.

Lord Romilly, M.R., held¹ trustees liable who had paid over trust funds on the faith of a marriage certificate that proved to be forged, on the ground that the trustees were bound to pay over the fund to the persons entitled to it, and ought to have seen to the genuineness of the authority to receive money.² The liability of the trustees was thus for personal default. The subsequent cases have, as we have just seen, limited the tendency of the earlier authorities to make trustees liable where the act of a properly authorized and qualified agent has intervened between the trustees and the loss.

o distinction between *cestui que trust* under disability and those *sui juris*.

An attempt to distinguish the liabilities of trustees, as they relate to the property of married women or children, or others under disability, from their liability where the *cestui que trust* is *sui juris*, was defeated by the decision of the House of Lords in *Shropshire Union Railways and Canal Company v. The Queen*.³

Non-disclosure of trust in conveyance.

*Carritt v. Real and Personal Advance Company*⁴ also demands notice in this place, since in that case an argument was addressed to the Court, that the suppression of notice of a trust in a conveyance to a trustee was a "misstatement" "on the face of any document stating something which was not the truth," within the remarks of Lord Cairns⁵ in the case just noticed, that invalidated the title of the *cestui que trust* as against a purchaser from the trustee. Chitty, J., however, held:⁶ "the practice of conveyancers and the convenience of dealing with real property is the justification for keeping the trusts off the face of the deed; and he did not consider himself at liberty to say at this day "that where purchasers are dealing with real estate or leasehold estate they are not entitled to frame their deed (so long as they do not make any direct misrepresentation on the face of it) according to the ordinary patterns used by conveyancers, and according to those forms which disclose part only of the transaction."⁷

¹ *Eaves v. Hickson*, 30 Beav. 136. "This view of mine has, I believe, been affirmed by the House of Lords in the case of a forgery upon one of the railway companies—*Midland Railway Company v. Taylor*, 8 H. L. C. 751": per Lord Romilly, M.R., *Sutton v. Wilders*, L. R. 12 Eq. 373, at 378. In *Hopgood v. Parkin*, L. R. 11 Eq. 74, Lord Romilly, M.R., founding himself on *Eaves v. Hickson*, held that a trustee is liable for the loss of a trust fund occasioned by his solicitor's default. But in *In re Speight*, *Speight v. Gaunt*, 22 Ch. Div. 727, the Court of Appeal overruled the decision (at 761, 768), emphasizing the rule that trustees employing properly qualified agents and having no reason to distrust their fitness in all respects for the work on which they employ them, do not "guarantee the solvency or honesty of the agents employed." See also per Stirling, J., *In re Partington*, *Partington v. Allen*, 57 L. T. 654.

² See a case before Lord Redesdale, *Doyle v. Blake*, 2 Sch. & Lef. (Ir. Ch.) 231.

³ L. R. 7 H. L. 496.

⁴ L. R. 7 H. L., at 509.

⁵ L. R. 7 H. L., at 509.

⁶ L. R. 7 H. L., at 509.

⁷ L. R. 7 H. L., at 509.

⁸ 42 Ch. D. 260.

⁹ 42 Ch. D., at 272.

¹⁰ The general principles of law regarding guardianship are collected by Hargrave in his notes to Co. Litt. 88 b; Com. Dig. Chancery, (3 O); Proceedings respecting the Education and Marriage of the Royal Family, 15 How. St. Tr. 1195; see especially opinion of Price, B., and Eyre, J., 1224; 1 Bl. Comm. 460; *Duke of Beaufort v. Bert*,

II. As to the position of a trustee with regard to the dealing with trust funds. II. Dealing with trust funds.

First, as to acts having special reference to that species of trustees called executors.

The rule of executors' liability in this regard is founded on two principles—

1. That, in order not to deter persons from undertaking these offices, the Court is extremely liberal in making every possible allowance, and cautious not to hold executors or administrators liable upon slight grounds; 1. Acts with a special reference to executors.

2. That care must be taken to guard against any abuse of their trust.¹

The duty of an executor is to collect assets "with all convenient speed,"² to pay all funeral expenses and debts, and to distribute the residue in the way indicated by the will of the testator; if he fails in any of these respects, subject to the rule just stated, he renders himself personally liable.³ Duty of executor.

If the executor retains balances, which he ought to have laid out either in compliance with the express directions of the will Where he retains funds in hand.

¹ P. Wms. 703; *Wellesley v. Duke of Beaufort*, 2 Russ. 1 at 20, 21, *sub nom.* *Wellesley v. Wellesley*, 2 Bligh, N. S. (H. L.) 124. In *Agar Ellis v. Lascelles*, 24 Ch. Div. 317, at 327, Brett, M.R., distinguishes between a testamentary guardian and a father, and observes: "The rights of a father as guardian, if they could be limited to his rights as guardian, would probably be the same as the rights of a testamentary guardian." The limits of paternal power since the Judicature Act, 1873, (36 & 37 Vict. c. 66), are marked by *In re Goldsworthy*, 2 Q. B. Div. 75. As to the father's rights generally, see *Smart v. Smart* (1892), App. Cas. 425, where the history of the law is traced. The father's rights of appointing a guardian exclusive of the mother is dealt with by the Guardianship of Infants Act 1886 (49 & 50 Vict. c. 27), and two cases decided under it, *In re Scanlan*, 40 Ch. D. 200, and *In re Magrath* (1892), 2 Ch. 496, C. A. (1893) 1 Ch., 143. See also the Custody of Children Act, 1891 (54 Vict. c. 3); *The Queen v. Gyngall* (1893), 2 Q. B. 232. The control that will be exercised over the guardian of a ward of the Court of Chancery is stated by Lord Lyndhurst, *Johnstone v. Beattie*, 10 Cl. & F. 42 at 84, 85. As to dealings with property by guardians, *Marquis Camden v. Murray*, 16 Ch. D. 161; *Jackson v. Talbot*, 21 Ch. D. 786; *Welch v. Channell*, 26 Ch. D. 58. The English law with regard to guardianship is largely derived from the Civil Law, Story, Eq. Jur. § 1350, and accordingly it may be well to give the governing principle of that system so far as a rule of diligence is concerned. In D. 27, 3, 1, it is thus stated: *In omnibus quæ fecit tutor, cum facere non deberet, item in his quæ non fecit, rationem reddet, hoc iudicio; præstando dolum, culpam, et quantum in rebus suis diligentiam.* See also D. 27, 3, 1, § 3; D. 26, 7, 5, § 7; D. 26, 7, 15; Cod. 5, 37, 22; Inst. 3, 27, 2. The liability of a guardian for loss of his ward's estate is lengthily treated in Landmesser's Appeal, 126 Pa. St. 115, 12 Am. St. R. 854, and note. See also 2 Kent, Com. 220 *et seq.*, especially 229-231, *The Duty and Responsibility of Guardians*, and Mr. Holmes's note in the 12th ed. 226.

² 1 Wms. Exors. (9th ed.), 1691.

³ A special direction to this effect in a will obliges to no more than the ordinary duty implied in the office of an executor, and there must necessarily be some discretion: *Buxton v. Buxton*, 1 My. & Cr. 80, at 93.

⁴ *Brown v. Burdett*, 40 Ch. D. 244, per Kay, J., at 254; *Powell v. Evans*, 5 Ves. 839; *Lowson v. Copeland*, 2 Bro. C. C. 156. Romilly, M.R., was of opinion that the executor is exonerated if it appears that his failure to obtain payment of a sum is not in fact injurious, *Clack v. Holland*, 19 Beav. 262, at 271. In *In re Brogden*, *Billing v. Brogden*, 38 Ch. D. 546 at 558, North, J., says of this case: "The law was stated in terms more favourable to the defendant than in any other case which I know." *Cp. East v. East*, 5 Hare 343, at 348. The *onus* is on the executor, where it is shewn

or from his general duty, he will be liable;¹ and if he has funds in hand, and permits debts carrying interest to remain unpaid, he will be liable for the interest.² From the nature of an executor's office it is often necessary for him to keep sums in hand for the making of payments, and where this is so he will not be liable, "unless it be shown that all the purposes for which the executor kept the money were answered";³ but when the Court is of opinion that the executor is needlessly and improperly retaining funds, it will hold him guilty of negligence and breach of trust, and charge him with interest on the sums he thus keeps in his hands.⁴ Yet to warrant the Court doing this there must be not a mere mistake,⁵ but both a clear case and a substantial balance.⁶

Trust to
accumulate.

Lord Eldon's
view.

In a case⁷ where there was a trust to accumulate for the benefit of the *cestui que trust* which the trustee neglected to act upon, Lord Eldon said: "Where there is an express trust to make improvement of the money, if he [the trustee] will not honestly endeavour to improve it, there is nothing wrong in considering him, as the principal, to have lent the money to himself upon the

that the debt existed and that the executor took no step to call it in. "It might be a justification for the executor to prove that, at the death of the testator, the debtor was utterly insolvent; but till that is proved, the law assumes the fact to be the other way": *Stiles v. Guy*, 16 Sim. 230, affirmed *sub nom. Styles v. Guy*, 1 Mac. & G. 422. *Ex parte Ogle, Ex parte Smith, In re Pilling*, L. R. 8 Ch. 711. As to executors' personal liability, *ante* 1488, *post* 1496.

¹ *Tebbs v. Carpenter*, 1 Madd. 290.

² *Hall v. Hallett*, 1 Cox (Ch.) 134, commented on by Bacon, V.C., *Nant-y-Glo and Blaina Ironworks Company v. Grave*, 12 Ch. D. 738, at 747. See *In re Baker*, 20 Ch. D. 230.

³ *Dawson v. Massey*, 1 Ball. & B. (Ir. Ch.) 219, at 231, and note; *Forbes v. Ross*, 2 Cox (Ch.) 113; *Flanagan v. Nolan*, 1 Moll. (Ir. Ch.) 84.

⁴ *Littlehales v. Gascoyne*, 3 Bro. C. C. 73, also see 107 and 433; *Forbes v. Ross*, 2 Cox (Ch.) 113; *Seers v. Hind*, 1 Ves. 294. The payment of interest by executors and trustees when compelled to refund, is treated by Chitty, J., in *In re Hulkes*, 33 Ch. D. 552, dissenting from *Saltmarsh v. Barrett* (No. 2), 31 Beav. 349, and following *Attorney-General v. Köhler*, 9 H. L. C. 654, and *Attorney-General v. Alford*, 4 De G. M. & G. 843. See *Masonic General Life Assurance Company v. Sharpe* (1892), 1 Ch. 154, at 170.

⁵ *Bruere v. Pemberton*, 12 Ves. 386. The court, however, considered the claim of the executor to be just in itself.

⁶ *Jones v. Morrall*, 2 Sim. N. S. 241, at 252; *Davenport v. Stafford*, 14 Beav. 319. For the law as to legacies and the executor's duty with regard to them, see *Ashburner v. Macguire*, and the notes to it, in 2 *White & Tudor*, L. C. in Equity (6th ed.), 246-320.

⁷ *Raphael v. Boehm*, 11 Ves. 92, at 107, 108, 13 Ves. 591, considered *Tebbs v. Carpenter*, 1 Madd. 290, at 300; *Heighington v. Grant*, 5 My. & Cr. 258, 1 Ph. 600 at 604; *Feltham v. Turner* (1870), 23 L. T. (N. S.) 347. The question of the liability of trustees to pay compound interest is considered in a note (c), 2 Kent Comm. 231, the conclusion of which is that authority and the reason of the thing preponderate alike in favour of the allowance under the limitations stated in the note, and that the total abandonment of the rule would operate in many cases most unjustly as respects the right of the *cestui que trust*, and would introduce a lax discipline that would be dangerous to the vigilant and faithful administration of trust estates. Trustees have now to accumulate the residue of the income of infants after payments for maintenance and education under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 43, sub-sec. 2.

same terms, upon which he could have lent it to others, and as often as he ought to have lent it, if it be principal; and as often as he ought to have received it and lent it to others, if the demand be interest, and interest upon interest." "This is a species of case, in which the Court would shamefully desert its duty to infants by adopting a rule, that an executor might keep money in his hands without being answerable, as if he had accumulated; and, if the Court cannot find out from the actual circumstances proved, that he has attempted accumulation, and the charge falls more heavily upon him on that account, *the fault is his own*¹ in not showing what endeavours to improve it he had made."

But this statement must not be taken without limitation.² "If," says Sir Thomas Plumer,³ "the executor has balances which he ought to have laid out, either in compliance with the express directions of the will or from his general duty, even when the will is silent on the subject, yet if there be nothing more proved in either case, the omission to lay out amounts only to a case of negligence and not of misfeasance." In the case before him the Vice-Chancellor held the facts to show "a case of negligence," and the executors were charged the usual interest at £4 per cent.

Distinction
noted by Sir
Thomas
Plumer.

One expression in the judgment of the Vice-Chancellor seems to require explanation. The correct antithesis plainly is not between misfeasance and negligence, but between that gross negligence which, in the words of the civil law, *plane dolo comparabitur*,⁴ and failure to attain that standard of care, *quo plerique ejusdem conditionis homines solent pervenire*; or perhaps, between a recklessness which connotes culpability, and heedlessness which only marks a falling short of the amount of diligence due in the circumstances.⁵

Comment.

A loss sustained by the *cestui que trust*, through the trustee neglecting his duty to invest, renders the trustee chargeable to the extent of the loss, and irrespective of whether he derives benefit from the breach of trust or not.⁶

Trustee
chargeable to
extent of loss
arising from
neglect to
invest.

¹ In the report in 11 Ves. at 108, this is printed "the fault is not his own," an obvious misprint.

² Dornford v. Dornford, 12 Ves. 127, at 129; Brown v. Sansome, McClell. & Younge (Ex.), 427, banker trustee unnecessarily retaining trust funds.

³ Tebbe v. Carpenter, 1 Madd. 290, at 307.

⁴ D. 11, 6, 1 § 1.

⁵ 2 Spence Eq. Jur. 192; Byrchall v. Bradford, Madd. & Geld. 13. In Holmes v. Dring, 2 Cox (Ch.) 1, Sir Lloyd Kenyon said: "It was never heard of that a trustee could lend an infant's money on private security. This is a rule which should be rung in the ears of every person who acts in the character of trustee, for such an act may very probably be done with the best and honestest intention, yet no rule in a Court of Equity is so well established as this." The principal amount decreed was made payable with interest at £4 per cent. For the general characteristics of the rule of liability of trustees, see Wharton, Negligence (2nd ed.), §§ 515, 525.

⁶ Montford v. Cadogan, 17 Ves. 485, 19 Ves. 633; *in re* Parker, 19 Q. B. D. 84.

Executor not to carry on trade of his testator unless expressly authorized.

An executor must not carry on the trade of his testator unless expressly authorized to do so;¹ where he is directed to do so, the trade and the debts are, so far as personal liability goes, looked at as his own;² he is nevertheless entitled to go for indemnity to the fund applied to carry on the business, but not to the general funds of the testator,³ while the creditors of the business have only the same right.⁴

Where business carried on under express authority in testator's will.

If, however, executors carry on a business under an authority given by the will of their testator, they are entitled to a general indemnity out of the estate as against all people claiming under the will. Where the rights of creditors of the testator intervene other considerations arise. The fact that creditors stand by while executors are carrying on a business so as to be able to sell it as a going concern, will, indeed, entitle the executors, even against the creditors, to an indemnity from the liabilities properly incurred in doing so; but there is a difference where executors carry on a business for purposes beyond what is necessary for effecting a sale. In this latter case the mere fact of a creditor standing by and not immediately enforcing his debt will not entitle the executors, as against him, to be indemnified out of the estate; still, if there be circumstances from which the proper inference is that the business was carried on with the assent of the creditors and for their benefit, then the executors are entitled, even against the creditors, to be indemnified out of the whole estate, and not merely out of the assets which come into existence subsequently to the testator's death.⁵

Rule summed up by Lord Macnaghten in *Dowse v. Gorton*.

The law is summed up by Lord Macnaghten⁶ as follows: "If the business has been properly continued as between the executors and the creditors, or if the creditors choose to treat it so, which comes to the same thing, the executors are entitled to be indemnified against all liabilities properly incurred in carrying it on. If it has been improperly continued and the creditors choose to treat the continuance as improper (which, of course, they are not bound to do), they may proceed in the proper way to make

¹ *Kirkman v. Booth*, 11 Beav. 273; *In re Chancellor, Chancellor v. Brown*, 26 Ch. D. 42. See an article as to Indemnity of Executor continuing testator's business, *Law Quarterly Review*, vol. ix. 331-340.

² *Farhall v. Farhall*, L. R. 7 Ch. 123. As to the personal liability of an executor on his own contracts, 2 Wms. *Executors* (9th ed.), 1666-1678. A judgment *de bonis propriis* against an executor is erroneous where the action is upon a contract of his testator's and a devastavit is not proved, *Smith v. Chapman*, 93 U. S. (3 Otto) 41.

³ *Fraser v. Murdoch*, 6 App. Cas. 855, per Lord Selborne, C., at 866; *Hobbs v. Wayet*, 36 Ch. D. 256.

⁴ *Strickland v. Symons*, 26 Ch. D. 245; *Shearman v. Robinson*, 15 Ch. D. 548, holds that the creditors' right is merely to be put in the place of the executor. See *In re Blundell, Blundell v. Blundell*, 44 Ch. Div. 1, per Lindley, L.J., at 11.

⁵ *Dowse v. Gorton* (1891), App. Cas. 190. As to the liability of an executor generally for carrying on his testator's trade, 2 Wms. *Executors* (9th ed.), 1680-1690.

⁶ *Dowse v. Gorton* (1891), App. Cas. at 203.

the executors accountable for the value of the assets used in carrying on the business, and they may also follow the assets and obtain a charge on the business in the hands of the executors for the value of the assets misapplied, with interest thereon; and they may enforce the charge, if necessary, by means of a receiver and a sale. Then there can be no room for any claim to indemnity on the part of the executors. The charge in favour of the trust estate must be satisfied first. The executors can only take what is left. But the creditors must do one thing or the other. Though they are not bound by what they do in ignorance, and may, by leave of the Court, sue in respect of wilful default after having taken the usual order, they cannot approbate and reprobate in one breath. They cannot claim the assets of the business as a going concern in the state and condition in which those assets happen to be at the moment when they choose to intervene, and at the same time refuse the executors' indemnity in respect of liabilities incurred in carrying on the business."

If, again, a business is carried on by executors at the instance of creditors, but without authorization by the will, the relation between the executors and the creditors would appear to reduce itself to a case of the law of principal and agent.

Where executors carry on business at the instance of creditors.

Various doctrines were at one time current as to the circumstances in which an executor might employ the assets of his testator's estate in trade,¹ and distinctions were drawn between solvent and insolvent executors,² and assets specifically bequeathed and general assets.³ An uniform rule is now established that the executor is bound to account for all profits, however derived, to the estate of his testator.⁴ The beneficiary has his option either

Executor bound to account for all profits.

¹ Ratcliff v. Graves, 2 Cas. in Ch. 152.

² Adams v. Gale, 2 Atk. 106.

³ Child v. Gibson, 2 Atk. 603.

⁴ Vyse v. Foster, L. R. 7 H. L. 318, at 329. In the Court of Appeal (L. R. 8 Ch. 309, at 333), James, L.J., said "It was pointed out by Lord Cranworth, in Attorney-General v. Alford (4 De G. M. & G. 843 at 851), that this Court has no jurisdiction in this class of cases to punish an executor for misconduct by making him account for more than that which he actually received, or which it presumes he did receive or ought to have received. This Court is not a Court of penal jurisdiction. It compels restitution of property unconscientiously withheld; it gives full compensation for any loss or damage through failure of some equitable duty; but it has no power of punishing any one. In fact, it is not by way of punishment that the Court ever charges a trustee with more than he actually received, or ought to have received, and the appropriate interest thereon. It is simply on the ground that the Court finds that he actually made more, constituting moneys in his hands 'had and received to the use' of the *cestui que trust*. A trustee, for instance, directly lending money to his firm is answerable for such money, with full interest, to the uttermost farthing; but to make him answerable for all the profits made of such money by all the firm would be simply a punishment—a punishment arbitrary and most unreasonable in this, that its severity would be in the inverse ratio of the gravity of the offence. A man squandering trust money with deliberate dishonesty in prodigal extravagance would be answerable for it with 4 per cent. interest; a man lending it (at good interest) to a large, solvent, and prudent well established firm of which he was a partner, would be punished by a fine equal to all the profits made thereby by all the partners." See Stroud v. Gwyer,

of taking the profit or charging the executor with interest.¹ The executor will be held to employ money in trade if, being a trader, he places it to his own banking account; since thereby he procures himself a credit not his due.²

Executor not
liable for bad
judgment.

An executor is not liable for bad judgment; nor is one executor bound to surrender his own judgment because one of his co-executors has a different opinion from himself; so that he will not be liable in the event of his view proving wrong while that of his co-executor turns out right, and the testator's estate suffers injury from not acting on it.³

When assets
to be realized.

There is no absolute rule fixing the time from which executors who have neglected to realize assets outstanding upon improper investments are to be liable; generally the conversion should take place within a year from the testator's death. Accordingly, in the event of an action being brought, executors who have not realized by that time have the *onus* thrown on them to justify their not doing so; ⁴ unless they have an absolute discretion to postpone the conversion, when they will not be liable where loss occurs, even though some of the property consists in shares in unlimited companies.⁵ In deciding whether a reasonable discretion was exercised or not the Court will look into all the circumstances of the case, such as the nature of the investment, the confidence the testator had in the investment, the efforts made by the executor to realize, the state of the market, and the length of time that had elapsed since the testator's death.⁶

28 Beav. 130, and *Jones v. Foxall*, 15 Beav. 388, with the comment of Lord Selborne in *Vyse v. Foster*, L. R. 7 H. L. at 346. Where trustees have without authority expended money in a manner presumably productive of benefit to the estate, they are entitled in an action for an account to an inquiry what benefit that expenditure has produced. This was ordered in *Conway v. Fenton*, 40 Ch. D. 512.

¹ Usually at the rate of 4 per cent., unless some higher rate of profit has been obtained: *Emmet v. Emmet*, 17 Ch. D. 142; or where the executor is guilty, not merely of negligence, but of actual corruption or deliberate breach of trust, when 5 per cent. will be allowed: *Ex parte Ogle*, L. R. 8 Ch. 711. See *Hall v. Hallett*, 1 Cox (Ch.) 134. In *De Cordova v. De Cordova*, 4 App. Cas. 692, interest was allowed against executors of a testator domiciled in Jamaica at the rate of 6 per cent.

² *Treves v. Townshend*, 1 Bro. C. C. 384.

³ *Buxton v. Buxton*, 1 My. & Cr. 80, followed in *Marsden v. Kent*, 5 Ch. D. 598. See *The Heirs Hiddingh v. Denysen*, 12 App. Cas. 624. As to failure to exercise a discretion, *Gainsborough v. Watcombe Terra Cotta Company* (1885), 54 L. J. Ch. 991; *Re Owens*, *Jones v. Owens*, 47 L. T. 61, where Jessel, M.R., says at 64: "Sec. 3 of the Conveyancing and Law of Property Act 1881, will have to be considered. It may have a revolutionary effect on this branch of the law. It looks as if the only question left would be, whether the executors have acted in good faith or not;" see *In re Agg-Gardner*, 25 Ch. D. 600. *Sculthorpe v. Tipper*, L. R. 13 Eq. 232.

⁴ *Grayburn v. Clarkson*, L. R. 3 Ch. 605; *Hughes v. Empson*, 22 Beav. 181.

⁵ *In re Norrington*, 13 Ch. D. 654.

⁶ *The Heirs Hiddingh v. Denysen*, 12 App. Cas. 624. See *Churchill v. Lady Hobson*, 1 P. Wms. 241, where testator had made one of his executors his banker during his life. This decision has been questioned. But see also *Chambers v. Minchin*, 7 Ves. 186, at 198; *Vin. Abr. Trust (N. a)*, Co-Trustee, Chargeable how far for the Acts and Receipts of the other, pls. 8, 9. In *Home v. Pringle*, 8 Cl. & F. at 264, the mere fact of trustees allowing balances to remain against their agent, at the

In the case of legacies payable under a general disposition in a testator's will, the same rule of a distribution within a year is applicable. The test is, when might a distribution be made if the trustees act with reasonable diligence? The presumption is that a year after the death of the testator is the period within which his property might with reasonable diligence be administered.¹

An executor is liable to refund, who, having received the assets² of his testator, voluntarily,³ and without sufficient excuse,⁴ parts with any portion of them to his co-executor, who but for that act could not have obtained possession of them, so that they are embezzled or lost.⁵ It is otherwise if funds are handed over to facilitate the performance of some duty of the executorship, for instance, the payment of debts in the ordinary course;⁶ for "he is considered to do this of necessity; he could not transact business without trusting some persons, and it would be impossible for him to discharge his duty if he is made responsible where he remitted to a person to whom he would have given credit, and would in his own business have remitted money in the same way."⁷

So, too, it is said by Lord Redesdale in the case just cited:⁸ "If a receipt be given for the mere purposes of form, then the signing will not charge the person not receiving [the fund in respect of which the receipt is given]; but if it be given under circumstances purporting that the money, though not actually received by both executors, was under the control of both, such a receipt shall charge, and the true question in all those cases seems to have been, whether the money was under the control of both executors; if it was so considered by the person paying

Rule as to distribution.

Where executor is liable to refund.

Effect of giving receipts.

annual settlement of his accounts, where it is impossible to include his whole receipts and payments for the year, was held not a breach of trust or such culpable negligence as would make them liable for the ultimate balances due from him to the trust. See *Seton v. Dawson*, 4 Dunlop 310; *Scott v. Handyside's Trustees*, 6 Macph. 753; *Aitken v. Hunter*, 9 Macph. 756; *Currey v. Watson*, 11 Times L. R. 371.

¹ *Brooke v. Lewis*, Madd. & Geld. 358, per Leach, V.C., at 359. See 2 Wms. Executors (9th ed.), 1239.

² *Candler v. Tillett*, 22 Beav. 257, at 263. In *Gasquoine v. Gasquoine* (1894), 1 Ch. 470, it is said by Kay, L.J., at 477, that the proposition in *Candler v. Tillett*, that an executor who does an act by which his co-executor obtains sole possession of a part of the testator's estate, is liable for the co-executor's misapplication of it, must be read "who unnecessarily does an act." An act is not "unnecessary" if it is done in the regular course of business in administering the property.

³ This, of course, is not so where the executor has no legal right to retain: *Davis v. Spurling*, 1 Russ. & My. 64. ⁴ *Langford v. Gascoyne*, 11 Ves. 333.

⁵ *Townsend v. Barber*, 1 Dick. (Ch.) 356.

⁶ *Bacon v. Bacon*, 5 Ves. 331. Cp. *Speight v. Gaunt*, 9 App. Cas. 1.

⁷ Per Lord Redesdale, *Joy v. Campbell*, 1 Sch. & Lef. (Ir. Ch.) 328, 341.

⁸ *Joy v. Campbell*, 1 Sch. & Lef. (Ir. Ch.) 328, at 341. As to these cases, *Bacon v. Bacon*, and *Joy v. Campbell*, see per Jessel, M.R., *Speight v. Gaunt*, 22 Ch. Div. 727, at 743. As to the greater rights creditors may have than legatees, see *Doyle v. Blake*, 2 Sch. & Lef. (Ir. Ch.) 231, at 239.

the money, then the joining in the receipt by the executor who did not actually receive it, amounted to a direction to pay his co-executor; for it could have no other meaning; he became responsible for the application of the money just as if he had received it."

Transmission
of money
amongst
executors.
Sir William
Grant's rule.

The rule affecting transmission of money from one executor to another as laid down by Sir William Grant, M.R.,¹ in all cases is, that "if an executor does any act, by which money gets into the possession of another executor, the former is equally answerable with the other; not, where an executor is merely passive, by not obstructing the other in receiving it. But if the one contributes in any way to enable the other to obtain possession, he is answerable; unless he can assign a sufficient excuse."

An executor, or trustee, may not sell his testator's property to himself, and any such attempted sale will be declared void at the suit of one person among many interested, and even if such person's actual interest may probably be reduced to nothing by prior claims.²

Lord Eldon's
reason for the
rule.

The reason for the universality of this rule is stated by Lord Eldon, C.,³ to rest on the consideration that "as no Court is equal to the examination and ascertainment of the truth in much the greater number of cases," the general interests of justice require such transactions to be set aside in every instance. Yet as a purchase by a trustee of trust property, or a sale to the trust of a trustee's own property is not void, but voidable, it may be confirmed either directly or by long acquiescence and absence of election.⁴

2. Acts with
no special
reference to
executors.

They must
put the trust
property in
security.

Secondly, as to acts which have no special reference to that species of trustees called executors.

It is the duty of trustees to see that all those acts are done which are necessary or expedient to put the trust property in security and out of the power of strangers to the trust to deal with it.⁵ "Trustees must," in Lord Langdale's emphatic words, "*make it impossible* for any unauthorised person to receive and misapply the fund."

Bound to
invest.

Trustees are bound to invest trust-moneys not wanted for the immediate purpose of their trust, and cannot excuse themselves

¹ Langford v. Gascoyne, 11 Ves. 333, at 335; see also Underwood v. Stevens, 1 Meriv. 712; Williams v. Nixon, 2 Beav. 472; Bruen v. Gillet, 115 N. Y. 10, 12 Am. St. R. 764.

² Benningfield v. Baxter, 12 App. Cas. 167; *In re Postlethwaite*, Postlethwaite v. Rickman, 59 L. T. 58. As to transfer of assets by executor to his bankers to secure executor's debt, Hill v. Simpson, 7 Ves. 152.

³ *Ex parte James*, 8 Ves. 337, at 345.

⁴ Hammond v. Hopkins, 143 U. S. (36 Davis), 224; Hoyt v. Latham, 143 U. S. (36 Davis), 553.

⁵ Macnamara v. Carey, Ir. R. 1 Eq. 9, at 35; Jacob v. Lucas, 1 Beav. 436; Kingdon v. Castleman, 46 L. J. Ch. 448; Woodhouse v. Woodhouse, L. R. 8 Eq. 514.

on the ground that they did not themselves use the money, but placed it to a separate account at the bankers.¹ It may be stated as a general rule, that if a trustee is guilty of unreasonable delay in investing a fund, or, if it is his duty to pay, in paying it over to the beneficiary, he will be liable for interest for the period of his unnecessary delay in doing so.²

The rule is similar with regard to money outstanding upon personal security. Though trustees are not to rush into litigation, they will not be justified in merely applying by lawyer's letter for payment of a debt, even if (the trustee being an executor) the debt was a loan by the testator 'himself,'³ but they must follow up their letter by legal proceedings,⁴ unless there is a well-founded belief on the part of the trustees that an action would be useless. The burden of proving this lies on the trustees.⁵

In the case of a settlement, where the trustees were to get in the money "whenever they shall think fit and expedient to do so," they were held not entitled to stay their hands from enforcing payment on account of the interest of the tenant for life without regard to that of *all the cestuis que trust*.⁶

In the *bond fide* exercise of a discretion trustees may always compromise a debt or otherwise deal with it without incurring a personal liability;⁷ and it is no ground for liability that they refuse a compromise.⁸

Now, by the Trustee Act, 1893,⁹ ample powers are conferred on executors and trustees in this matter. By that Act:—

1. An executor or administrator may pay or allow any debt or any claim on any evidence he may think sufficient;¹⁰
2. An executor or administrator or two or more trustees acting together, or a sole trustee where the instrument creating his

¹ *Ashburnham v. Thompson*, 13 Ves. 402; *Younge v. Combe*, 4 Ves. 101.

² *Tickner v. Smith*, 3 Sm. & G. 42, and cases cited in *Blogg v. Johnson*, L. R. 2 Ch. 225.

³ *Powell v. Evans*, 5 Ves. 839, for personal security fluctuates day by day: *Bailey v. Gould*, 4 Y. & C. (Ex.) 221, at 226.

⁴ *Lowson v. Copeland*, 2 Bro. C. C. 156. This is the case though the outstanding debt is in the hands of a co-executor, who was treated as a private banker by the testator: *Styles v. Guy*, 1 Mac. & G. 422. In *Yeatman v. Yeatman*, 7 Ch. D. 210, it was held that mere refusal to sue was not sufficient to justify a legatee in suing an executor and an alleged debtor for loss of assets, and the test suggested was whether a party should be allowed to institute such a suit after refusal by the legal representative to sue. *Meldrum v. Scorer*, 56 L. T. 471; *Barker v. Birch*, 1 De G. & Sm. 376.

⁵ *Billing v. Brogden*, 38 Ch. Div. 546; *Walker v. Symonds*, 3 Swanst. 1.

⁶ *Luther v. Bianconi*, 10 Ir. Ch. R. 194.

⁷ *Pennington v. Healey*, 1 Cr. & M. 402; *Forshaw v. Higginson*, 8 De G. M. & G. 827, citing, at 834, *Blue v. Marshall*, 3 P. Wms. 381.

⁸ *Ex parte Ogle*, L. R. 8 Ch. 711.

⁹ 56 & 57 Vict. c. 53, s. 21.

¹⁰ Re-enacting 44 & 45 Vict. c. 41 s. 37. See *Re Owens*, 47 L. T. 61. The extension to an administrator is new: *Re Clay and Tetley*, 16 Ch. D. 3; *West of England and South Wales Bank v. Murch*, 23 Ch. D. 138.

authority so authorises,¹ may accept any composition or may allow any time for payment of any debt, or settle it in any way that seems to him or them expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith;

3. The enactment applies to trusts where the trust deed does not express a contrary intention;

4. These provisions are retrospective.

Other powers
conferred on
trustees.

The Trustee Act, 1893, also confers powers on trustees of renewable leaseholds to renew their leases and to raise money for the purpose.² Trustees are also exonerated by the same Act for acting or paying money in good faith under powers of attorney which are in fact avoided by death or act of the party, and they are indemnified against any other than their own acts and defaults in respect of money and securities actually received by them,³ notwithstanding the signature of any receipt for the sake of conformity.⁴

Onus on the
trustee to
excuse himself
when trust
fund lost.

When the money which is the subject of a trust is not forthcoming, it is not for the *cestuis que trust* to show that if the trustee has done his duty the loss would have been avoided; it is for the trustee who is seeking to excuse himself to shew that no good would have resulted had he taken proceedings. "The rule is well laid down by Lord Cottenham in the case of *Clough v. Bonds*,⁵ that where a trustee does not do that which it is his duty to do, *prima facie* he is answerable for any loss occasioned thereby."⁶ "Once shew that he has neglected his duty, and *prima facie* he is answerable for all the consequences of that neglect."⁷

Trustee must
not take a
position where
his interest
and his duty
are in
conflict.

A trustee must not place himself in any situation where his interests conflict with his duty. Thus he may not do acts which he might employ others to perform, and take payment for doing them. The rule accordingly is, that "no person in whom fiduciary duties are vested shall make a profit of them by employing himself, because in doing this he cannot perform one part of his

¹ By sec. 22 (1) the survivor may exercise a joint power, unless the contrary is expressed in the instrument; see *Crawford v. Forshaw* (1891), 2 Ch. 261.

² Sec. 19.

³ Sec. 23. See *Bailey v. Collett*, 18 Beav. 179, as to the old law.

⁴ Sec. 24. For the definition of "securities" see sec. 50. As to a trustee's liability for the insolvency of his agent, see *Brier v. Evison*, 26 Ch. Div. 238; for his agent's negligence, *Benett v. Wyndham*, 4 De G. F. & J. 259; for his felonious act, *Jobson v. Palmer* (1893), 1 Ch. 71. A trustee accepting office at the request of a beneficiary is entitled to indemnity from the beneficiary where he is not negligent: *Jervis v. Wolfertan*, L. R. 18 Eq. 18.

⁵ 3 My. & C. 490, at 496.

⁶ *Billing v. Brogden*, 38 Ch. Div. 546, per Cotton, L.J., at 567.

⁷ L. c. at 568.

trust—namely, that of seeing that no improper charges are made.”¹

The custody of title-deeds and convertible securities is a point of special importance. If in the executing a trust there is no need to deal with title-deeds, which may perhaps be locked up for years without any call to refer to them, a deposit of them in a bank or a safe deposit, in a box of which the trustees keep the key is a proper mode of bestowing them. If they are required from time to time the deposit with a solicitor is justified so long at any rate as there is occasion to refer to them from time to time, and probably longer. If the trust property consists of bonds and certificates payable to bearer, they cannot without negligence be left under the control either of a solicitor or any other agent.²

Custody of title-deeds and convertible securities.

The determination of the question in what funds trust property may be invested without negligence depends largely on the terms of the trust.³ Some general principles, however, there are which must be glanced at.

Trust investments.

Trustees will not be justified in lending on personal security, such as a promissory note,⁴ unless specially authorized to do so

Trustees not justified in lending on personal security.

¹ Broughton v. Broughton, 5 De G. M. & G. 160, per Lord Cranworth, at 164. See *In re Doody* (1893), 1 Ch. 129, as to position of solicitor mortgagee charging profit costs against mortgagor, where *Cradock v. Piper*, 1 Macn. & G. 664, which is usually cited as the leading case on solicitor trustee's profit costs, was commented on; *In re Smith's Estate* (1894), 1 Ir. R. 60; *In re Fish*, Bennett v. Bennett (1893), 2 Ch. 413, is a decision on a clause in a will empowering a solicitor trustee to receive out of the estate his usual professional costs and charges for business transacted by him, including business which might have been performed in person by a trustee not being a solicitor; *In re Webb*, Lambert v. Still (1894), 1 Ch. 73. Formerly the equitable estate of a *cestui que trust* in land or in the proceeds of the sale of land devised on trust for conversion, dying intestate vested in the trustee: *Burgess v. Wheate*, 1 Eden 177; *Gallard v. Hawkins*, 27 Ch. D. 298; but by the Intestates Estate Act, 1884 (47 & 48 Vict. c. 71), s. 4, “the law of escheat shall apply in the same manner as if the estate or interest above-mentioned were a legal estate in corporeal hereditaments.” See per Lord Eldon, *Walker v. Symonds*, 3 Swanst. 1, at 62.

² *Field v. Field* (1894), 1 Ch. 425.

³ In *Ritchies v. Ritchies' Trustees*, 15 Rettie 1086, the purchase of fully paid-up stock in a limited company was held not an “investment.” “I think,” said Lord Craighill, at 1093, “it was a partnership in a company, and the trustees became partners. The shares that were bought formed their contribution of the capital. But there can be no investment of money properly so-called where the trustees become partners;” *sed quare*. See *Re Norwich and Norfolk Provident Building Society*, 45 L. J. Ch. 785, for an “investing” member of a building society. As to “investments,” see *Arnould v. Grinstead*, 21 W. R. 155. See *In re Hurst*, *Addison v. Topp*, 67 L. T. 96, 8 Times L. R. 528 (C. A.).

⁴ *Terry v. Terry*, Prec. Ch. 273, where an executor and trustee “with power by the will to act in everything for the advantage of an infant,” was held justified in laying out personal estate in the purchase of lands for the infant, with the saving that “if he lends money on bad security, he must answer it out of his own pocket.” The Lord Chancellor (Cowper) having decreed that a sum lent by the trustees on a personal bond and lost should be refunded by them, said “he did this for example to discourage men from taking single personal bonds; and that, considering the contingencies and hazards of trade, a man's bond for £100 that is to lie any time, is not security for above £50, and so he would take this.” *Darke v. Martyn*, 1 Beav. 525, where executors opened an account with a banker and took two bankers' notes carrying interest for the amount; *Moyle v. Moyle*, 2 Russ. & M. 710. In *Walker v. Symonds*,

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Words so wide as a direction that trust-money should
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The powers of trustees with respect to investments are now
regulated by the Trustee Act, 1893,³ to which reference must
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What is
money under
the control of
the Court?

There has been some conflict of judicial opinion as to whether
money paid into Court under the Lands Clauses Consolidation
Act, 1845,⁴ is under the control of the Court within the meaning
of the Law of Property Act, 1860.⁵ The rule is now established
to be in accordance with the view of Cotton, L.J.,⁶ that "cash

3 *Swanst. 1*, at 63, executors who were directed "to put on interest to be well secured,
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borough in *Adye v. Fenilletan*, 3 *Swanst. 84 n.*; *Holmes v. Dring*, 2 *Cox (Ch.) 1*. The
purchase of an equity of redemption is not an investment which trustees would be
justified in making under the common form of a power of investment: *Worman v.*
Worman, 43 *Ch. D. 296*.

¹ *Styles v. Guy*, 1 *Mac. & G. 422*; *Boss v. Godsall*, 1 *Y. & C. (Ch.) 617*. This
overrules *Lord Dorchester v. Effingham*, 1 *Tamlyn, 279*.

² *Forbes v. Ross*, 2 *Bro. C. C. 430*; *Francis v. Francis*, 5 *De G. M. & G. 108*.

³ *Cocker v. Quayle*, 1 *Russ. & My. 535*; *Greenham v. Gibbeson*, 10 *Bing, 363*.

⁴ *Cockburn v. Peel*, 3 *De G. F. & J. 170*; *Stuart v. Stuart*, 3 *Beav. 430*; *Stewart v. Sanderson*, L. R. 10 *Eq. 26*; *In re Boyces, Minors*, L. R. 1 *Eq. 45*; *Costello v. O'Rorke*, L. R. 3 *Eq. 172*.

⁵ *Pickard v. Anderson*, L. R. 13 *Eq. 608*; *Forbes v. Ross*, 2 *Bro. C. C. 430*.

⁶ *Cock v. Goodfellow*, 10 *Mod. 489*, see per Lord Chancellor Parker, at 496.

⁷ 56 & 57 *Vict. c. 53 ss. 1-9*. See *Hume v. Lopes* (1892), *App. Cas. 112*; *Re Owthwaite* (1891), 3 *Ch. 494*; *Re National Permanent Building Society*, 43 *Ch. D. 431*. See also *In re Baring, Jeune v. Baring* (1893), 1 *Ch. 61*.

⁸ 8 *Vict. c. 18*.

⁹ 23 & 24 *Vict. c. 38*.

¹⁰ *Ex parte St. John Baptist College, Oxford*, *In re Metropolitan and District Railways Act*, 22 *Ch. Div. 93*; *Jackson v. Tyas*, 52 *L. J. Ch. 830*; *In re Brown*, 59 *L. J. Ch. 530*.

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It is manifest that, in cases where the subjects of the security

are exclusively or mainly used for the purposes of trade, no

prudent investor can be in a position to judge of the amount of

margin necessary to make a loan for a term of years reasonably

secure until he has ascertained, not only their present market

price, but their intrinsic value apart from those trading con-

siderations which give them a speculative and it may be a

temporary value." The rule stated must be observed in

normal circumstances, yet is always liable to be displaced by

proof of exceptional matters, either augmenting or detracting

from its force.¹ Evidence of value, in order to entitle it to

sufficient weight to discharge from liability,² should come from

disinterested persons, and not from those connected in any

way with the property valued, and apart from legislation to be

Effect of the
decision in
that case.

¹ As to investments under the control of the Court, see S. C. Funds Rules, 1894, Part VII., ss. 69-75.

² *Stickney v. Sewell*, 1 My. & Cr. 8, at 15; see *Stretton v. Ashmall*, 3 Drew. 9.

³ Per Jessel, M.R., *Speight v. Gaunt*, 22 Ch. Div. 727, at 746; see *Jones v. Lewis*, 3 De G. & S. 471. "Reversed on appeal, it is believed by Lord Truro, on Feb. 26, 1852, but on what ground not known": *Lewin, Trusts* (9th ed.), 357, n. 2; *Kennedy v. Kennedy*, 12 Rettie 27.

⁴ Per Lord Watson, 12 App. Cas. 727, at 733.

⁵ The rule is discussed by Kay, J., *In re Olive, Olive v. Westerman*, 34 Ch. D. 70; see also *In re Salmon, Priest v. Uppleby*, 42 Ch. D. 351. In *In re Partington, Partington v. Allen*, 57 L. T. 654, this rule is said not to be one of law, but the general result of experience.

⁶ *Norris v. Wright* 14 Beav. 291; *Ingle v. Partridge*, 34 Beav. 411.

by the instrument creating the trust, even to a person to whom there is the clearest evidence that their trustor would have lent on the same security; for personal security fluctuates from day to day, and the trustees are to exercise their own, not their trustor's, discretion.¹ Even where specially authorized to lend on personal security they will not be allowed to lend to one of their own number.² Moreover, a power to lend on personal security must be strictly construed as against the trustee.³

Trustees must deal impartially.

Trustees must deal impartially between the various interests they have in charge, not preferring the tenant for life to the remainder-man, nor yet sacrificing him.⁴

Trustees may in certain cases make an advance upon a personal undertaking.

Where trustees have a power to advance money on "real or personal security," they may make an advance upon a person's personal undertaking as distinguished from the security of personal property.⁵ This is subject to the requirement of reasonable care and caution in making an investment of that class. Words so wide as a direction that trust-money should "be placed out to interest or other way of improvement" will not be construed as an authority for using the trust fund in trade.⁶

The powers of trustees with respect to investments are now regulated by the Trustee Act, 1893,⁷ to which reference must be made.

What is money under the control of the Court?

There has been some conflict of judicial opinion as to whether money paid into Court under the Lands Clauses Consolidation Act, 1845,⁸ is under the control of the Court within the meaning of the Law of Property Act, 1860.⁹ The rule is now established to be in accordance with the view of Cotton, L.J.,¹⁰ that "cash

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under the control of the Court must mean cash standing in the name of the Accountant-General in any cause or matter."¹

In the case of trustees authorized to advance money upon mortgage, the rule used to be that an advance of two-thirds of the value upon property of permanent value, as freehold land, was within the rule of ordinary prudence; as to property in houses, "which fluctuates in value, and is always deteriorating," an advance of not more than one-half was justifiable.² The tendency latterly was, however, "to lean to the side of the honest trustee, and not to be anxious to find fine and extraordinary reasons for fixing him with any liability," but "to endeavour as far as possible, having regard to the whole transaction, to avoid making an honest man, who is not paid for the performance of an unthankful office, liable for the failure of other people from whom he receives no benefit."³

Where trustees are authorized to advance money on mortgage.

Lord Watson thus expressed his view in the House of Lords in *Learoyd v. Whiteley*:⁴ "I do not think these have been laid down as hard and fast limits up to which trustees will be invariably safe, and beyond which they can never be in safety to lend, but as indicating the lowest margins which in ordinary circumstances a careful investor of trust funds ought to accept. It is manifest that, in cases where the subjects of the security are exclusively or mainly used for the purposes of trade, no prudent investor can be in a position to judge of the amount of margin necessary to make a loan for a term of years reasonably secure until he has ascertained, not only their present market price, but their intrinsic value apart from those trading considerations which give them a speculative and it may be a temporary value." The rule stated must be observed in normal circumstances, yet is always liable to be displaced by proof of exceptional matters, either augmenting or detracting from its force.⁵ Evidence of value, in order to entitle it to sufficient weight to discharge from liability,⁶ should come from disinterested persons, and not from those connected in any way with the property valued, and apart from legislation to be

Lord Watson's opinion in the House of Lords in *Learoyd v. Whiteley*.

Effect of the decision in that case.

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⁶ *Norris v. Wright* 14 Beav. 291; *Ingle v. Partridge*, 34 Beav. 411.

presently noticed was required to be that of persons cognizant of local circumstances, and not that of persons, however generally qualified, who possessed no particular experience.¹ Trustees advancing money on mortgage must themselves inquire into the correctness of the statements made by the mortgagors as to the value and nature of the property and the amount of outgoings, and are not protected by a valuation if the valuer is not instructed to make such inquiries; it was also added, they "should tell their valuers that they are lending trust moneys, and that they do not desire to lend more than one-half of the actual value of the property."²

And of the
Trustee Act,
1893.

All this law must now be taken subject to the provisions of the Trustee Act, 1893,³ which provides that:

(1) A trustee is not to be chargeable with breach of trust by "reason *only* of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, provided that it appears to the Court that in making the loan the trustee was acting upon a report as to the value of the property⁴ made by a person whom he reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate, or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in the report, and that the loan was made under the advice of the surveyor or valuer expressed in the report;"

(2) A trustee lending money on the security of any leasehold property is not to be chargeable with breach of trust only upon the ground that in making such loan he dispensed either wholly or partly with the production or investigation of the lessor's title;

(3) A trustee is not to be chargeable with breach of trust only upon the ground that in effecting the purchase of, or in lending money upon the security of any property he has accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion of the court the title accepted be such as a person acting with prudence and caution would have accepted;

¹ *Budge v. Gummow*, L. R. 7 Ch. 719; *Fry v. Tapson*, 28 Ch. D. 268.

² *In re Partington*, *Partington v. Allen*, 57 L. T. 654, at 658. For the cases previous to the Trustee Act 1893, see Seton, Decrees (5th ed.), 975.

³ 56 & 57 Vict. c. 53 s. 8 (1); *In re Godfrey*, 23 Ch. D. 483.

⁴ *Cann v. Wilson*, 39 Ch. D. 39, overruled in *Le Lievre v. Gould* (1893), 1 Q. B. 495; *In re Walker*, 59 L. J. Ch. 386; *Bullock v. Bullock*, 55 L. J. Ch. 221.

(4) The section is to have a retrospective operation.

It therefore becomes essential that the valuer be "instructed and employed independently of the owner of the property," and that a form of valuation should be adopted so as to shew compliance with this section. The trustee will not be authorized by this to lend upon leaseholds, though, if he have the power otherwise, the provisions of the Act will apply.

By section 9 of the same Act the liability of the trustee is limited, in the case where he has advanced too much money on a security, to the excess beyond what he could properly have advanced on it.¹

Even where the terms of their trust deed seem to give trustees the widest powers—as, for instance, a power "to invest on such securities as they should approve"—they are still bound to the use of care and the exercise of a sound discretion; so that if they invest in stocks of an unusual character, the burden will be cast on them of justifying their action.²

In the case of loss incurred by trustees, unless in the case of wilful default or very gross negligence, they are to be charged only with that which they have actually received,³ and not with mere imaginary values.⁴ Nor were trustees joining in a receipt for trust-money merely for conformity at any time liable, in the absence of other circumstances, for the misapplication of money coming into the hands of co-trustees.⁵ The *onus*, nevertheless, lay on the trustee who joined in a receipt to shew that he did not in fact receive it, and only joined for conformity;⁶ in the absence of evidence, he was liable *in solido*.⁷

By the Trustee Act, 1893,⁸ however, the law is modified, and it is provided that a trustee shall, without prejudice to the provisions of the instrument, if any, creating the trust, be chargeable only for money and securities actually received by him, notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust moneys or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss,

¹ For the old law see *Fry v. Tapson*, 28 Ch. D. 268; *In re Somerset*, *Somerset v. Earl Poulett* (1894), 1 Ch. 231.

² *Stretton v. Ashmall*, 3 Drew. 9; *Consterdine v. Consterdine*, 31 Beav. 330; *Zambaco v. Cassavetti*, L. R. 11 Eq. 439.

³ 1 Seton, Decrees (5th ed.), 985.

⁴ *Palmer v. Jones*, 1 Vern. 144.

⁵ *In re Fryer*, 3 K. & J. 317. *Ante*, 1499.

⁶ *Brice v. Stokes*, 11 Ves. 319, 2 White & Tudor L. C. in Equity (6th ed.), 967.

⁷ *Westley v. Clarke*, 1 Eden 357.

⁸ 56 & 57 Vict. c. 53, s. 24.

Requisites of a valuer under the section.

Limitation of liability where a trustee has advanced too much money on a security.

Where apparently the widest powers are given, the exercise of a sound discretion is not superseded.

Loss incurred by trustees.

Trustees liable only for funds actually received.

unless the same happens through his own wilful default; and may reimburse himself, or pay or discharge out of the trust property all expenses incurred in or about the execution of his trusts or powers.

Money must not be left in a trustee's hands longer than necessary.

When money is actually received (though it is safe to permit a co-trustee to receive it¹) a trustee is not justified in leaving the money in his co-trustee's hands for a longer time than is reasonably necessary.² Assurances that the trust fund is intact are not sufficient; he must ascertain for himself that it is so in fact.³

Trustee bound in certain cases to proceed against his co-trustee.

If one trustee finds that his colleague has committed a breach of trust, he is bound, if not to bring an action for the restoration of the trust for his own exoneration,⁴ at least to take such steps as may, with regard to the circumstances of the case, be most prudent;⁵ if he conceals the breach or abstains from action, he thereby becomes answerable for his co-trustee's default.⁶

Following trust funds.

There is no distinction between a rightful and a wrongful disposition of property, so far as the right of the beneficial owner to follow the proceeds is involved. Neither is this right confined to the case of express trusts. When a purchase is made with trust-money, the beneficial owner has a right to elect either to take the property purchased or to hold it as security for the trust-funds laid out in its purchase. When a purchase is made with a mixed fund, the beneficial owner can no longer elect to take the property, but he is entitled to a charge upon it up to the amount of trust-funds expended in its purchase; and the doctrine of the old cases, that money has no ear-mark and cannot be followed, even in the case of a trust-fund, is no longer law.⁷

Indemnity of one trustee from another.

Although it never admitted of doubt that all trustees are liable for breach of trust to their beneficiaries,⁸ whether actually taking part in a breach of trust or only neglecting their duties so as to render a breach of trust possible, it has been contended that, where a trustee has not actively interfered, he may have an indemnity over against his co-trustee whose actual wrong-doing has occasioned the mischief. In two cases, *Lockhart v. Reilly*⁹ and *Thompson v. Finch*,¹⁰ this claim for indemnity has been

Lockhart v. Reilly.

¹ *Townley v. Sherborne, Bridg.* (C. P.) 35, 2 White & Tudor L. C. in Equity (6th ed.), 960.

² *Brice v. Stokes, supra*; cp. the Trustee Act 1893, (56 & 57 Vict. c. 53), s. 24.

³ *In re Brogden, Billing v. Brogden*, 38 Ch. Div. 546; *Walker v. Symonds*, 3 Swanst. 1; *Mendes v. Guedalla*, 2 J. & H. 259.

⁴ *Lewin, Trusts* (9th ed.), 290, citing *Franco v. Franco*, 3 Ves. 75, and *Earl Powlett v. Herbert*, 1 Ves. 297, which cases both appear to be on these points.

⁵ *Walker v. Symonds*, 3 Swanst. 1, at 71.

⁶ *Boardman v. Mosman*, 1 Bro. C. C. 68.

⁷ *In re Hallett's Estate, Knatchbull v. Hallett*, 13 Ch. D. 696. *Ante*, 883 n.² As to the rule in *Clayton's Case*, 1 Meriv. 572, at 585, Tudor, L. C., on *Mercantile Law* (3rd ed.), i. applying between *cestuis que trust*, see *Hancock v. Smith*, 41 Ch. D. 456.

⁸ *Ante*, 1478 *et seqq.*

⁹ 25 L. J. Ch., 697.

¹⁰ 22 Beav. 316, 8 De G. M. & G. 560.

allowed; but in both the trustee against whom relief was sought was a solicitor, and the action through which loss to the trust resulted arose from misuse of the position of solicitor. In *Bahin v. Hughes*,¹ however, Cotton, L.J., thought it "wrong to lay down any limitation of the circumstances under which one trustee would be held liable to the other for indemnity, both having been held liable to the *cestui que trust*; but so far as cases have gone at present, relief has only been granted against a trustee who has himself got the benefit of the breach of trust, or between whom and his co-trustees there has existed a relation which will justify the Court in treating him as solely liable for the breach of trust." The other Lords Justices agreed.²

Thompson v. Finch.

By the Supreme Court of Judicature Act, 1873,³ no claim of a *cestui que trust* against his trustee for any property held on express trust,⁴ or in respect of any breach of such trust, could be held barred by any Statute of Limitations.⁵

Provision of the Judicature Act, 1873, as to limitation of action.

An alteration of the law is effected by the Trustee Act, 1888,⁶ the 8th section of which is not touched by the Trustee Act, 1893, and enables trustees to plead the Statute of Limitations, "except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds thereof still retained by the trustee." This section was considered by Fry, L.J., in *In re Bowden*,⁷ an action brought by a recently appointed trustee against an old trustee and the representatives of two deceased trustees for breaches of trust. The last of the breaches of trust complained of took place considerably more than six years before the action was begun. The question then arose whether a plea of the Statute of Limitations was within the new Act.

Alteration effected by Trustee Act, 1888.

Considered by Fry, L.J., in *In re Bowden*.

¹ 31 Ch. Div. 390, at 395; *In re Partington*, *Partington v. Allen*, 57 L. T. 654, at 662.

² See also *Butler v. Butler*, 7 Ch. D. 554.

³ 36 & 37 Vict. c. 66, s. 25, sub-sec. 2; *Banner v. Berridge*, 18 Ch. D. 254.

⁴ The distinction between an express trust and a constructive trust is indicated in *Beckford v. Wade*, 17 Ves. 87; *Petre v. Petre*, 1 Drew. 371; and is treated at length in *Soar v. Ashwell* (1893), 2 Q. B. 390. Cp. *Thorn v. Heard* (1893), 3 Ch. 530, affd. (1894), 1 Ch. 599.

⁵ *Burdick v. Garrick*, L. R. 5 Ch. 233; *Stone v. Stone*, L. R. 5 Ch. 74; see per Lindley, L.J., *Masonic and General Life Assurance Company v. Sharpe* (1892), 1 Ch. 154, at 166. Cp. 37 & 38 Vict. c. 57.

⁶ 51 & 52 Vict. c. 59, s. 8. Sec. 6 provides for an indemnity to a trustee who has committed a breach of trust "at the instigation or request or with the consent in writing of a beneficiary." See *Ricketts v. Ricketts*, 64 L. T. 263, not followed, *Griffith v. Hughes* (1892), 3 Ch. 195, and explained in *Bolton v. Currie* (1895), 1 Ch. 544. Sec. 6 is now repealed, but is re-enacted by sec. 45 of the Trustee Act, 1893 (56 & 57 Vict. c. 53). See *Mara v. Browne*, 11 Times L. R. 352. *Ante*, 1491.

⁷ 45 Ch. Div. 444; see *In re Swain* (1891), 3 Ch. 233; *In re Page*, *Jones v. Morgan* (1893), 1 Ch. 304; *In re Gurney*, *Mason v. Mercer* (1893), 1 Ch. 590; *In re Somerset*, *Somerset v. Earl Poulett* (1894), 1 Ch. 231; *Flitcroft's Case*, 21 Ch. D. 519, decided that as a director is a trustee in certain of his capacities, sec. 8 would therefore protect him; *Thorn v. Heard* (1893), 3 Ch. 530, (1894), 1 Ch. 599. See *ante*, 1409.

The Lord Justice points out¹ that sub-section 1 (a), which was relied on, and which reserves "all rights and privileges conferred by any Statute of Limitations," was inapplicable, as "it is obvious that if a person had not been a trustee he could not be sued for a breach of trust; and, further, there is no right or privilege, that I am aware of, conferred by any Statute of Limitations in respect of a breach of trust." The Lord Justice then shews that sub-section 1 (b) is material. This provides for the case of an action to "recover money or other property, and is one to which no existing Statute of Limitations applies," in which case the trustee shall be entitled to the same defence "as if the claim had been against him in an action of debt for money had and received, but [the statute] "shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession." That limitation, says Fry, L.J.,² "does not apply to the present case, because in the present case the action is brought by one trustee against another." The same sub-section also provides that the Statute of Limitations shall run against a married woman entitled in possession for her separate use.

Moore v.
Knight.

The 8th section of this Act was also invoked, but unsuccessfully, by the defendants in *Moore v. Knight*,³ where money of the plaintiff's came for investment without fraud into the hands of the defendants, a firm of solicitors. No investment was made, but the money was misappropriated and applied to the purposes of the firm, though members of the firm were ignorant of such misappropriation. The period fixed by the Statute of Limitations having expired, it was contended that by force of section 8 of the Trustee Act, 1888, the innocent partners were exonerated from liability, and that the case of *Blair v. Bromley*,⁴ which otherwise concluded the case, did not apply. *Blair v. Bromley*⁴ was the case of money coming into the defendants' hands without fraud, which subsequently was used for firm purposes by the fraud of one of them; and this fraud was concealed till after the period fixed by the Statute of Limitations had expired, by misrepresentations attributable to the firm. These misrepresentations, it was held, deprived an innocent partner of the benefit of the statute. Stirling, J., however, giving judgment in *Moore v. Knight*,⁵ points out that this "decision rests on principles of the law relating to representation and to partnership, not on those which relate to trusts," and therefore is unaffected by the provisions of the Trustee Act, 1888.⁶

Blair v.
Bromley.

Distinguished
by Stirling, J.

¹ 45 Ch. Div., at 450.

³ (1891), 1 Ch. 547.

⁵ (1891), 1 Ch. 547.

² L. c. at 451.

⁴ 2 Ph. 354, 5 Hare 542.

⁶ As to the relation of concealed fraud to the Statute of Limitations, see *Gibbs v.*

In the absence of a Statute of Limitations, negligence or delay *Laches*, in the enforcement of a right—*laches*, as it is called—may extinguish the best-founded claim. The doctrine of the Court of Chancery as to this was: "Nothing can call forth this Court into activity but conscience, good faith, and reasonable diligence; where these are wanting the Court is passive and does nothing."¹ But the Statute of Limitations should be taken as a guide, and the lapse of the statutory period "becomes a very material element for consideration;" though in the case quoted² no conclusion was arrived at as to whether delay alone will constitute a sufficient defence.³ Judging from the expressions in the older cases, it may be concluded that where the period has been exceeded which, under the statutes, would constitute a bar, equity will, as a rule, refuse relief; but in equity special circumstances may always be averred in answer to the defence of delay; and, where these are present, any particular case may be excluded from the operation of a general rule that might work injustice if rigidly enforced.⁴

In the United States, however, the rule is more distinctly expressed. Brown, J., in *Gallihier v. Cadwell*,⁵ sums up the American cases, many of which he cites,⁶ thus: "They all proceed upon the theory that *laches* is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded in some change in the condition or relations of the property or the parties." While in the subsequent case of *Halstead v. Grinnan*,⁷ Brewer, J., Rule in the United States. Brewer, J., in Halstead v. Grinnan. delivering the opinion of the Court, said: "The length of time during which the party neglects the assertion of his rights, which must pass in order to show *laches*, varies with the peculiar circumstances of each case, and is not like the matter of limitations subject to an arbitrary rule. It is an equitable defence, controlled by equitable considerations, and the lapse of time must be so great, and the relations of the defendant to the rights such

Guild, 9 Q. B. Div. 59. To exclude the operation of the Statute of Limitations (37 & 38 Vict. c. 57), s. 8, the trust must be express; an implied or constructive trust is not sufficient: *In re Davis* (1891), 3 Ch. 119; *In re Barker* (1892), 2 Ch. 491.

¹ Per Lord Camden, C., *Smith v. Clay*; note to *Deloraine v. Brown*, 3 Bro. C. C. 633, at 640.

² *Allcard v. Skinner* (1887), 36 Ch. Div. 145, per Lindley, L.J., at 186. See *London, Chatham and Dover Railway Company v. Bull* (1882), 47 L. T. 413; 2 Spence Eq. Jur. 60-62; *Story*, Eq. Jur. § 105.

³ *Colsell v. Budd*, 1 Camp. 27.

⁴ *Story*, Eq. Jur. § 64, where the maxim *Æquitas sequitur legem* is expounded.

⁵ 145 U. S. (38 Davis), 368, at 373; see also *Hammond v. Hopkins*, 143 U. S. (36 Davis), 224; *Foster v. Mansfield, &c. Railroad Company*, 146 U. S. (39 Davis), 88; *Ware v. Galveston City Company*, 146 U. S. (39 Davis), 102.

⁶ In one case, *Société Foncière v. Milliken*, 135 U. S. (28 Davis) 304, a delay of two years in commencing proceedings to set aside a judgment was held fatal.

⁷ 152 U. S. (45 Davis) 412, at 416.

that it would be inequitable to permit the plaintiff to now assert them. There must of course have been knowledge on the part of the plaintiff of the existence of the rights, for there can be no *laches* in failing to assert rights of which a party is wholly ignorant, and whose existence he had no reason to apprehend. And yet, as said by Mr. Justice Brown speaking for the Court in *Foster v. Mansfield, Coldwater, &c. Railroad*,¹ 'The defence of want of knowledge on the part of one charged with *laches* is one easily made, easy to prove by his own oath, and hard to disprove; and hence the tendency of Courts in recent years has been to hold the plaintiff to a rigid compliance with the law which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts.'

Claims not enforceable by reason of the Statute of Frauds and claims barred by Statute of Limitations.

The settlor may extend the exemptions of the usual indemnity clause.

An executor, it may be here remarked, commits a *devastavit* if he pays a debt due to a creditor who cannot enforce it by reason of the Statute of Frauds.² It is otherwise if it is merely barred by the Statute of Limitations.³

In *Wilkins v. Hogg*⁴ it was argued that, notwithstanding an extraordinary authority given by a special clause providing that any trustee should not be obliged to see to the application of moneys paid by him to his co-trustee, or be responsible by express or implied notice of the misapplication, the trustees were not protected and were to be dealt with exactly as if there were no such special clause. The Court refused assent to such a proposition, and laid down the rule that, though certain cases are provided for by the usual indemnity clause, there exist others to which protection may be afforded by special provision of the creator of the trust. This is on the principle that it is perfectly competent for him to define the liability incident to the duty of a trustee in a trust of his own creation, so long as he keeps within the bounds of law; and this rule excludes cases of "gross negligence or personal misconduct."⁵ It is obvious that in this connection gross negligence is used to mean flagrant negligence in the sense of the maxim, *Magna negligentia, culpa est; magna culpa dolus est*.⁶

Lord Westbury, in *Wilkins v. Hogg*,⁷ specifies three classes of cases in which a trustee is liable under the ordinary indemnity clause, as follows:

¹ 146 U. S. (39 Davis) 88, at 99.

² *In re Rowson, Field v. White*, 29 Ch. D. 358.

³ *Stahlschmidt v. Lett*, 1 Sm. & G. 415; *Coombs v. Coombs*, L. R. 1 P. & D. 288; *Hunt v. Wenham* (1892), 3 Ch. 59. See the limitations to this power laid down in *Midgley v. Midgley* (1893), 3 Ch. 282. ⁴ 3 Giff. 116; affirmed, 8 Jur. N. S. 25.

⁵ *Pass v. Dundas*, 43 L. T. 665.

⁶ *Post*, 1625 n.1.

⁷ 8 Jur. N. S. 25. In *Wilson v. Moore*, 1 My. & K. 126, Sir John Leach, M.R.,

1. Where a trustee having received money, hands it over without securing its due application ;
2. Where a trustee allows his co-trustee to receive money, and does not make due inquiry as to his dealing with it ; and
3. Where a trustee, becoming cognizant of a breach of trust, actual or meditated, remains quiescent after having acquired such knowledge.

Three classes of cases specified by Lord Westbury in which a trustee would be liable under the ordinary indemnity clause.

As none of these involves any absolute misconduct in respect of which liability would attach, they may be excepted in a trust deed.

There is a fourth class, where personal misconduct is involved ; for example, the trustee colludes with his co-trustee, and hands over trust-money with a reasonable ground for believing or suspecting that the trustee to whom he hands it will commit a breach of trust ; for which, despite any clause in a trust deed, the trustee handing over the fund is liable. This class comprises the species of negligence which Bacon, V.C., describes as "gross,"¹ and within the rule of the Roman law, *magna culpa dolus est*.²

A fourth class. Where personal misconduct is involved.

There are some cases where persons occupy the position of quasi trustees under the appointment of a court, for instance, receivers.

Receivers.

The functions of a receiver are well described in a United States case—*Davis v. Gray*³—by Swayne, J., as follows : "A receiver is appointed upon a principle of justice for the benefit of all concerned. Every kind of property of such a nature that, if legal, it might be taken in execution, may, if equitable, be put into his possession. Hence the appointment has been said to be an equitable execution. He is virtually a representative of the Court, and of all parties in interest in the litigation wherein he is appointed." He is required to take possession of property as directed, because it is deemed more for the interests of justice that he should do so than that the property should be in the possession of either of the parties in the litigation. He is not appointed for the benefit of either of the parties, but of all concerned. Money or property in his hands is in *custodia legis*. He has only such power and authority as are given him by the Court, and must not exceed the prescribed limits. The Court will not allow him to be sued touching the property in his charge,

Functions of receivers.

says, at 146 : "All parties to a breach of trust are equally liable ; there is between them no primary liability." See also *Gray v. Lewis*, L. R. 8 Eq. 526, at 543, L. R. 8 Ch. 1035.

¹ *Pass v. Dundas*, 43 L. T. 665.

² D. 50, 16, 226. As to the remedies of *cestui que trust* for breach of trust, see *Devaynes v. Robinson*, 24 Beav. 86, n. 1, at 99.

³ 16 Wall. (U. S.) 203.

⁴ L. c. at 217.

⁵ *Jeremy, Equity*, 249 ; *Davis v. Duke of Marlborough*, 2 Swanst. 125 ; *Shakel v. Duke of Marlborough*, 4 Madd. 463.

nor for any malfeasance as to the parties, or others without its consent; nor will it permit his possession to be disturbed by force, nor violence to be offered to his person while in the discharge of his official duties. In such cases the Court will vindicate its authority, and, if need be, will punish the offender by fine and imprisonment for contempt. The same rules are applied to the possession of a sequestrator. Where property in the hands of the receiver is claimed by another, the right may be tried by proper issues at law, by a reference to a master or otherwise as the Court in its discretion may see fit to direct.¹ Where property in the possession of a third person is claimed by the receiver, the complainant must make such person a party by amending the bill, or the receiver must proceed against him by suit in the ordinary way. After tenants have attorned to the receiver, he may distrain for rent in arrear in his own name. In a suit between partners he may be required to carry on the business, in order to preserve the goodwill of the establishment, until a sale can be effected."²

Personal liability of receiver.

Owen v. Cronk.

In the case of a receiver being required to carry on a business, the question arises as to the personal liability thereby incurred by him. In *Owen v. Cronk*³ the receiver was appointed by trustees of a trading company's business under a trust deed, and carried on the business in the name of the company, his own name being added as receiver. The Court of Appeal held the receiver not personally liable, on the ground that "he would have to account, not to the Court, but to the persons who appointed him."⁴

Burt, Boulton, and Hayward v. Bull.
Rule stated by Rigby, L.J.

In *Burt, Boulton, and Hayward v. Bull*,⁵ the position of receivers and managers appointed by the Court was considered. Rigby, L.J., thus expressed his view of the *prima facie* effect of contracts made by receivers and managers *eo nomine*:⁶ "According to my understanding of the matter, it cannot be intended by the Court in such cases to put forward an officer of the Court to carry on business—which might involve the making of contracts almost daily in the ordinary course of business—in such a manner as would be likely to delude members of the public into the idea that somebody would be responsible on those contracts, whereas nobody would be so responsible. I do not say that there might not be very special cases in which the intention might be that

¹ *Empringham v. Short*, 3 Hare 461.

² Besides the cases noted in the extract given above from *Swayne, J.*'s judgment there are many additional authorities given in notes in the report. See *Booth v. Clark*, 17 How. (U. S.) 322, at 331; also at 335 for the distinction between a receiver in Chancery and an assignee in bankruptcy. See as to Receivers, *Daniell*, *Chancery Practice* (6th ed.) 1664-1720; *Seton, Decrees* (5th ed.) 635-687.

³ (1895) 1 Q. B. 265.

⁵ (1895) 1 Q. B. 276.

⁴ Per Lord Esher, M.R., *l. c.* 272.

⁶ *L. c.* at 283.

receivers and managers should not pledge their personal credit, though I am not aware that any such have arisen; but with regard to receivers and managers appointed in the ordinary course of the business of the Court, unless I am much mistaken as to the meaning of such an appointment, the intention is that the receiver and manager so appointed should appear to the world as the person carrying on the business in the usual way, making himself personally liable on all contracts, except in cases where there might be a special stipulation to the contrary, and looking for indemnity to the assets or the persons for whose benefit ultimately the business was carried on." "As soon as it appears that he has no principal, and is a receiver appointed by the Court, it is implied, I think, when he enters into a contract, that it is a real contract, by which he binds himself personally, and he must look for indemnity from the liability so incurred to the assets." "I think that the notion upon which the Court has always proceeded in exercising its jurisdiction to appoint a manager of a business is, not that he is to be in the position of an agent, although there is no principal, but that he is to be in a position similar to that of persons who in a fiduciary capacity carry on a business, in the course of which contracts have to be entered into—*e.g.*, executors or trustees who, by the terms of the instrument appointing them, are directed to carry on a business for the benefit of others. The rule has always been that such persons are *prima facie* themselves personally liable, and they cannot get rid of liability on the contracts made by them merely by describing themselves in the contract as executors or trustees."

Receivers have, however, a right against the funds; and also the protection of the Court restraining persons from bringing suits against them in respect of their receiverships, except where leave is given by the Court which appoints them;¹ though this does not, as appears from the cases just noted, extend to actions brought against them personally in respect to contracts made by them in the course of the business of the receivership.²

In the United States the rule of liability is differently stated: Rights of receiver.
Rule in the United States.

¹ *Knight v. Lord Plimouth*, 3 Atk. 480; *Shaw v. Rhodes*, 2 Russ. 539; *Seagram v. Tuck*, 18 Ch. D. 296; *Sargant v. Read*, 1 Ch. D. 600; *Taylor v. Neate*, 39 Ch. D. 538. For the extent of the liability of sureties under a receiver's recognisances, see *In re Graham* (1895), 1 Ch. 66.

² "I do not say that it would never be right to allow an action to be brought against a receiver, but no such action can be brought without leave of the Court"; per Lindley, L.J., *Searle v. Choat*, 25 Ch. Div. 723, at 727; *Helmore v. Smith* (No. 2), 35 Ch. Div. 449, per Bowen, L.J., at 456. Ever since the decision of *Morrice v. Bank of England*, Cas. temp. Talbot, 217, 2 Bro. Parl. C. 465, a decree for the administration of an estate has been treated as a judgment for all the creditors, and the Court will not permit any particular creditor to disturb the administration of the assets. The subject is discussed very fully in *Thompson v. Brown*, 4 Johns. (N. Y. Ch.) 619. See *Story, Eq. Jur.* § 530 *et seq.*; *Ames v. Trustees of Birkenhead Docks*, 20 Beav. 332.

Barton v.
Barbour.

"Actions against the receiver are, in law, actions against the receivership, or the funds in the hands of the receiver, and his contracts, misfeasances, negligences, and liabilities are official and not personal, and judgments against him as receiver are payable only from the funds in his hands."¹ In *Barton v. Barbour*² it is also said by Woods, J., delivering the opinion of the Court: "If claims arise against the receiver as such, whilst acting under the powers conferred on him, whether for labor performed, for supplies and materials furnished, or for injury to persons or property, then a question of some difficulty arises as to the proper mode of obtaining satisfaction and redress." "If the receiver is to be suable as a private proprietor of the railroad would be, or as the company itself while carrying on the business of the railroad was, it would become impossible for the Court to discharge its duty to preserve the property and distribute its proceeds among those entitled to it according to their equities and priorities. It has therefore been found necessary, and has become a common practice for a Court of Equity, in its decree appointing a receiver of a railroad property, to provide that he shall not be liable to suit unless leave is first obtained of the Court by which he was appointed."³

Liability for
torts com-
mitted in the
management
of a business
in the hands
of a receiver.

The rule of the liability of a receiver for torts committed in the management of the business of which he is receiver is most distinctly laid down in *Macnulta v. Lockridge*⁴ in the State Court. "A receiver of a railroad company, who is exercising the franchises of such company and operating its road, is, in his official capacity, amenable to the same rules of liability that are applicable to the company when it is operating the road by virtue of the same franchises. For torts committed by his servants while operating the railroad under his management, he is responsible upon the principle of *respondet superior*. The liability, however, is not a personal liability, but a liability in his official capacity only; and the damages for such torts are not to be recovered in suits against him personally, and collected on executions against his individual property, but recovered in suits or proceedings in which he is named or designated as receiver, and to be paid only out of the fund or property which the Court appointing him has placed in his possession and under his control. The corporation itself, having no control over either

¹ *Macnulta v. Lochridge*, 141 U. S. (34 Davis), 327, at 332, cited and approved by Fuller, C.J., delivering the opinion of the Court, *Texas and Pacific Railway Company v. Cox*, 145 U. S. (38 Davis) 593, at 601; *Texas and Pacific Railway Company v. Johnson*, 151 U. S. (44 Davis), 81. These cases, it may be remarked, are cases of tort.

² 104 U. S. (14 Otto), 126, at 134.

³ *L. c.* at 136.

⁴ 31 Am. St. R. 362, at 366.

the receiver or his servants, is not, in the absence of an absolute liability imposed upon the company by statute, responsible for the negligence or torts of the employees of the receiver, and no suit against it for damages occasioned thereby can be maintained. These rules of law are well settled, and have been held in many adjudicated cases."

In case of misconduct or neglect a receiver is liable to be ordered to pay costs personally,¹ and one defending an action without the sanction of the court will not be allowed his costs.²

If a *cestui que trust*, who is *sui juris*, acquiesces in an improper investment, he cannot afterwards call it in question³ provided that it be made with his full knowledge⁴ and without any misrepresentation or concealment on the part of the trustees.⁵

Position of *cestui que trust* with regard to acquiescence in an improper investment.

This statement must, however, be taken with the qualification that the *cestui qui trust* is entitled to trust in and place reliance on his trustee, and a duty to inquire does not arise unless something has happened which suggests suspicion. There is no duty on a *cestui qui trust* to inquire into his trustee's discharge of the functions of his trust, in the absence of matter for suspicion.⁶

In re Salmon, *Priest v. Uppleby*⁷ may be here noted, where, after making an investment within the scope of the powers under the trust, the trustee retired and new trustees were appointed. Six years having elapsed, the new trustees, with the concurrence of the plaintiff, a beneficiary, but without notice to the retired trustee, sold the mortgaged property for £500 less than the amount of the trust fund invested in it. The beneficiary then brought his action against the retired trustee for the deficiency so far as the plaintiff's share in the estate was concerned. The investment was held to have been an improper one. For the defendant the case of *Knott v. Cottee*⁸ was cited, where the Master of the Rolls, speaking of improper investments, said: "The case must either be treated as if these investments had not been made, or had been made for his (the trustee's) own benefit out of his own moneys, and that he had at the same time

In re Salmon, *Priest v. Uppleby*.

Knott v. Cottee.

¹ *Ex parte Brown*, 36 W. R. 303.

² *Swaby v. Dickon*, 5 Sim. 629; *Bristowe v. Needham*, 2 Ph. 190.

³ *Harden v. Parsons*, 1 Eden 145. See the note at 150.

⁴ *Montford v. Lord Cadogan*, 17 Ves. 485, 19 Ves. 635.

⁵ *Burrows v. Walls*, 5 De G. M. & G. 233.

⁶ *Shropshire Union Railways and Canal Company v. The Queen*, L. R. 7 H. L. 496; *In re Vernon Ewens and Co.* 33 Ch. Div. 402; *Hartopp v. Huskisson*, 55 L. T. 773. Where a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the Court may in its discretion impound the interest of the beneficiary by way of indemnity, 56 & 57 Vict. c. 53, s. 45; *In re Bowden* *Andrew v. Cooper*, 45 Ch. D. 444. *Ante*, 1491 and 1517.

⁷ 42 Ch. Div. 351.

⁸ 16 Beav. 77.

⁹ L. c. at 79.

Thornton
v. Stokill.

retained moneys of the testator in his own hands." The trustee would accordingly be entitled to the property in which the investment had been made if he chose to pay up the trust fund; because the property purchased was never trust property, but only property purchased with trust funds and liable to be retained by the trust till redeemed by the making good the funds used in the purchase. Since, then, it was argued, the trustee was deprived of his option of taking the property by the sale, he could not, in those circumstances, be held to payment of the deficiency in its value at a sale made without his concurrence. This argument succeeded before Kekewich, J. On appeal the case of *Thornton v. Stokill*¹ was further cited for the defendant to establish the propositions that where trust money is improperly laid out in the purchase of property, the value of which proves insufficient, the *cestui que trust* has an option to take the property, or to have the deficiency made up, but that he is not entitled to take the property at its deficient value and then to prove. It was, however, pointed out by Cotton, L.J.,² that in that case the investment was outside the limits of the trust, while in the case before the Court the investment was warranted by the terms of the trust. The Court thereon expressed the opinion that the case cited had no bearing on the case before them, and, overruling Kekewich, J., drew a distinction between investments in their nature improper because outside the trustees' powers, and investments proper in themselves, that is, authorised by the powers of the trust, but on sale proved to be an improvident exercise of those powers. As to these latter the *cestui que trust* could not dissent till he had ascertained that the trustee had not acted with reasonable prudence; and that would not be in the case before the Court till the deficiency was manifested by a sale; so that the retired trustee was liable even though the beneficiary had had notice of the investment, which, in the case in question, the Court was of opinion he had not had. In the case of an investment outside the terms of the trust, the *cestuis que trust* must accept or reject, and this duty being on the *cestui que trust* in the event of failure to perform it the trustee would be discharged.³

Acquiescence. Acquiescence to be binding is not to be merely constructive, but direct and positive;⁴ nor will mere abstinence from complaint

¹ 1 Jur. N. S. 751.

² *In re Salmon, Priest v. Uppleby*, 42 Ch. Div. 351, at 369.

³ *L. c.* at 368, 369. See *In re Massingberd's Settlement*, 59 L. J. Ch. 107. *Thompson v. Finch*; 8 De G. M. & G. 560, distinguished *Babin v. Hughes*, 31 Ch. Div. 390.

⁴ *Thompson v. Finch*, 22 Beav. 316, 8 De G. M. & G. 560; *Farrant v. Blanchford*, 1 De G. J. & S. 107.

work a bar,¹ though neglect to sue for twenty years with a knowledge of a right has been held to do so.²

Any trustee or manager of a savings bank who neglects or omits to comply with the rules and regulations of the savings bank within the meaning of section 11 of the Trustee Savings Banks Act, 1863,³ may be compelled, under section 165 of the Companies Act, 1862,⁴ to pay an adequate sum towards the assets of the bank by way of compensation for any loss occasioned to the bank by his neglect or omission;⁵ but omission to attend meetings is not the same as neglect or omission of the duties which ought to have been performed at them.⁶

The vendor in possession after a contract for sale of land is, for some purposes, in the position of a trustee for the purchaser.⁷ He has the right to insist upon retaining possession until payment of the purchase money is made and the conveyance is accepted. "He has that right; but the question is, upon what terms that right is to be exercised? It appears to me that it must be upon the terms of his undertaking the duties of possession while he insists upon retaining possession."⁸ For example, he has to take reasonable care that the property is not deteriorated in the interval before completion while it still remains in the hands of the vendor, as by removing of fixtures, breaking windows, or anything of that kind.⁹ Thus, too, it was decided that where a trespasser, without either the authority or knowledge of the vendor of certain property, entered on the same and removed large quantities of surface soil, the purchaser could maintain an action against the vendor for a breach of trust in not using due care to prevent the removal.¹⁰

It was laid down by Kindersley, V.C., in *Browne v. Savage*,¹¹ that trustees must, "for their own security, give correct information

Negligence under the Trustee Savings Banks Act, 1863.

Vendor in possession after a contract for sale of land.

Browne v. Savage. Trustees to give correct information of prior assignments affecting trust property, if they answer at all.

¹ *Phillipson v. Gatty*, 7 Hare 516. In *Walker v. Symonds*, 3 Swanst. 1, at 58, Lord Eldon says: "It is the duty of trustees to afford to their *cestui que trust* accurate information of the disposition of the trust fund; all the information of which they are, or ought to be, in possession."

² *Bright v. Legerton* (No. 1), 29 Beav. 60, 2 De G. F. & J. 606; *In re Cross*, *Harston v. Tennison*, 20 Ch. D. 109. *Ante*, 1511.

³ 26 & 27 Vict. c. 87.

⁴ 25 & 26 Vict. c. 89.

⁵ *In re Cardiff Savings Bank*, *Davies' Case*, 45 Ch. D. 537.

⁶ *Marquess of Bute's Case* (1892) 2 Ch. 100.

⁷ *Phillips v. Silvester*, L. R. 8 Ch. 173; see per Jessel, M.R., *Earl of Egmont v. Smith*, 6 Ch. D. 469, at 475, referring to *Shaw v. Foster*, L. R. 5 H. L. 321, "which only re-stated what had been the well-known law of the Court of Chancery for centuries."

⁸ Per Lord Selborne, C., *Phillips v. Silvester*, L. R. 8 Ch. at 177. As to "wilful default" on the part of a vendor exonerating the purchaser from the payment of interest on the purchase money, *In re Wilson's and Stevens's Contract* (1894), 3 Ch. 546.

⁹ *Royal Bristol Permanent Building Society v. Bomash*, 35 Ch. D. 390, where *Bain v. Fothergill*, L. R. 7 H. L. 158, is distinguished.

¹⁰ *Clarke v. Ramuz* (1891), 2 Q. B. 456.

¹¹ 4 Drew. 635, at 639. This case is considered, as far as it is concerned with notice, in *Newman v. Newman*, 28 Ch. D. 674.

when inquiry is made of them, whether they have had notice of any prior assignments affecting their trust property." Hence it has been inferred that trustees are bound to answer such inquiries;¹ but Lindley, L.J., in *Low v. Bouverie*² points out that this view cannot be supported. "The duty of a trustee," says the Lord Justice, "is properly to preserve the trust fund, to pay the income and the *corpus* to those who are entitled to them respectively, and to give all his *cestuis que trust*, on demand, information with respect to the mode in which the trust fund has been dealt with, and where it is. But it is no part of the duty of a trustee to tell his *cestui que trust* what incumbrances the latter has created, nor which of his incumbrancers have given notice of their respective charges. It is no part of the duty of a trustee to assist his *cestui que trust* in selling or mortgaging his beneficial interest and in squandering or anticipating his fortune; and it is clear that a person who proposes to buy or lend money on it has no greater rights than the *cestui que trust* himself. There is no trust or other relation between a trustee and a stranger about to deal with a *cestui que trust*, and although probably such a person in making inquiries may be regarded as authorized by the *cestui que trust* to make them, this view of the stranger's position will not give him a right to information which the *cestui que trust* himself is not entitled to demand. The trustee, therefore, is, in my opinion, under no obligation to answer such an inquiry." The Lord Justice then examines the position of a trustee who does answer such an inquiry, and concludes that the duty of a trustee who thus undertakes to answer is merely to answer honestly—that is, to "answer to the best of his actual knowledge and belief," unless he either binds himself by a warranty, or so expresses himself as to estop himself from afterwards denying the truth of what he said.³

¹ Lewin, *Trusts* (8th ed.) 704; see 9th ed. 795.

² (1891), 3 Ch. 82, at 99. But see *In re Tillott, Lee v. Wilson* (1892), 1 Ch. 86; *Sawyer v. Goddard*, *Law Times* newspaper, 9th March 1895, 450.

³ As to the authority of *Burrowes v. Lock*, 10 Ves. 470, and *Slim v. Croucher*, 1 D. G. F. & J. 518, see per Lindley, L.J., *Low v. Bouverie* (1891), 3 Ch. 82, at 101, 102, and per Lord Selborne, C., *Brownlie v. Miller*, 7 Rettie (H. L.) 66, at 70.

CHAPTER III.

BANKERS.

A BANK is defined as an establishment for the custody of money Definition. received from, or on behalf of, its customers. Its essential duty is the payment of the orders given on it by its customers; its profits arise mainly from the investment of the money left unused by them.¹

I. The relation between banker and customer is that of debtor and creditor,² with a superadded obligation on the part of the banker to honour the customer's cheques so long as there are any assets of his in the banker's hands.³ Where the banker dishonours I. Banker his customer's debtor for the balance standing to the customer's account.

¹ Dr. Murray's Dictionary, *sub voc.* "Banker" includes a body of persons, whether incorporated or not, who carry on the business of banking: 45 & 46 Vict. c. 61, s. 2. See the Stamp Act, 1891 (54 & 55 Vict. c. 392), s. 29. As to the business of a banker, see *Foley v. Hill*, 2 H. L. C. 28; Macleod, *Theory and Practice of Banking* (4th ed.), on the rise and progress of banking in England, vol. i. 433; *Encyclopædia Britannica* (9th ed.) Banking.

² So that the Statute of Limitations runs as against any other simple contract debt, *Smith v. Leveaux*, 2 De G. J. & S. 1, at 5; *Phoenix Bank v. Risley*, 111 U. S. (4 Davis), 125, following *Marine Bank v. The Fulton Bank*, 2 Wall. (U. S.) 252. As to the test of whether the Statute of Limitations runs or not, see *Burdick v. Garrick*, L. R. 5 Ch. 233, at 240; *Banner v. Berridge*, 18 Ch. D. 254, at 263.

³ *Foley v. Hill*, 2 H. L. C. 28. Cp. *Pott v. Clegg*, 16 M. & W. 321, at 328, distinguished *In re Tidd*, *Tidd v. Overell* (1893), 3 Ch. 154, per North, J., at 157, with remarks of Cockburn, C.J., *Goodwin v. Roberts*, L. R. 10 Ex. 337, at 351; *Garnett v. M'Kewan*, L. R. 8 Ex. 10. In the argument in *Roberts v. Tucker*, 16 Q. B. at 575, Alderson, B., addressing Sir Frederick Thesiger, said: "You reason as if the customer bailed money to the banker to be kept with reasonable diligence and returned in specie. But the customer lends money to the banker and the banker promises to repay that money, and, whilst indebted, to pay the whole or any part of the debt to any person to whom his creditor the customer in the ordinary way requires him to pay it." Parke, B., added: "That is undoubtedly so," and after some more remarks, at 576: "A person possessed of a bill payable to bearer, or indorsed in blank, may give a discharge for it though not the lawful holder." In the United States the law is settled in the same sense by *Marine Bank v. Fulton Bank*, 2 Wall. (U. S.) 252, where Miller, J., says, at 256: "All deposits made with bankers may be divided into two classes, namely, those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter; and that other kind of deposit of money peculiar to banking business, in which the depositor for his own convenience, parts with the title to his money and loans it to the banker; and the latter, in consideration of the loan of the money and the right to use it for his own profit, agrees to refund the same amount, or any part thereof, on demand." See also *Thompson v. Riggs*, 5 Wall. (U. S.) 663. The position of branch banks is generally that of agencies of the principal office, though notice of dishonour should be given as if they were independent establishments, and payment of a cheque may be refused except at the branch where a customer keeps his account: *Prince v. Oriental Bank Corporation*, 3 App. Cas. 325.

his customer's cheque, having funds in hand to meet it, he is liable to an action for damages, though the customer may not have suffered actual loss or damage by the act.

Marzetti v. Williams.

*Marzetti v. Williams*¹ is an authority for the position that in such circumstances the amount of damages given should be greater than merely nominal. The cheque of which payment was refused in that case was only for £87 7s. 6d. This circumstance seemed to Lord Tenterden, C.J., an aggravation of the wrong; and the jury having found for the plaintiff with nominal damages, he remarked that it was a discredit to any person, and particularly to one in trade,² to have a "draft for so small a sum refused;" and the case being remitted to the jury under the instruction to find substantial damages, they returned a verdict for £500, which was afterwards reduced by consent, on an intimation from the Court, to £200.

Banker's obligation is to honour his customer's cheque only.

The banker's obligation is to honour his customer's cheque. To that end he is bound to know his customer's handwriting. If in any way he is deceived without the instrumentality of his customer, he must himself abide the loss. Thus, in *Hall v. Fuller*³ the alteration in a cheque was such that "no person in the ordinary course of business could observe it," yet the banker was held liable for the amount wrongly paid on it. The principle of the decision was expressed in *Young v. Grote*⁴ to be: "A banker who pays a forged cheque, is in general bound to pay the amount again to his customer, because, in the first instance, he pays without authority." The limitations on this proposition will be discussed subsequently in another connection.⁵

Credits on books of bank.

The credits on the books of the bank are *prima facie* evidence of the customer's right. Yet money deposited in a bank to the credit

¹ 1 B. & Ad. 415; *Whitaker v. Bank of England*, 6 C. & P. 700; *Rolin v. Steward*, 14 C. B. 595.

² In *Victoria* it has been held that a plaintiff who is not a trader, "and has therefore no mercantile character," cannot recover more than nominal damages unless he proves special damage; since there is no presumption legitimately deducible that a person who is not a trader suffers substantial damage by the dishonour of his cheque: *Bank of New South Wales v. Milvain*, 10 Vict. L. R. (Law) 393. In *Doria v. Bank of Victoria* the Court treated a schoolmaster as having a mercantile character, 5 Vict. L. R. (Law) 393.

³ 5 B. & C. 750. *Smith v. Mercer*, 6 Taunt. 76; *Roberts v. Tucker* (Ex. Ch.) 16 Q. B. 560; see, however, now 45 & 46 Vict. c. 61, s. 64 (1), and *post*, 1556 n. In *East Holyford Mining Company v. National Bank* it was held by the Irish Court of Common Pleas, Ir. R. 5 C. L. 508, that the banker of a public registered company is not bound to inquire whether the persons drawing cheques as directors against the company's banking account were legally appointed directors, or authorized to draw cheques, if there was nothing on the face of the transactions calculated to excite suspicion or inconsistent with the company's articles of association. This was reversed in the Exchequer Chamber, Ir. R. 7 C. L. 169; but the judgment of the Common Pleas was restored by the House of Lords, the judges having been called in to advise the House, *Mahony v. East Holyford Mining Company*, L. R. 7 H. L. 869.

⁴ 4 Bing. 253, per Best, C.J., at 258.

⁵ *Post*, 1575-1603.

of A. may be shewn to be the property of B. It may be reached by attachment on the part of the judgment creditors of B., or its payment by the banker to A. may be stopped by a proper notice on the part of B. that the money belongs to him. The credits in the banker's books are thus only *prima facie* evidence of ownership. But in the absence of any claim by the real owner the banker cannot dispute the right of his depositor, and is bound, as already has been pointed out, to honour his cheque.¹

A banker may be justified in one case only in refusing to pay a demand of his customer when the customer is in funds. This justification exists where the customer is a trustee and draws a cheque as trustee. To warrant the banker in refusing to pay there must be some misapplication of the proceeds intended by the trustee, and there must be proof that the bankers have knowledge of the intention.² A presumption of this knowledge is raised if the dealing in question is "*prima facie* inconsistent with the duty of an executor or trustee." "I think," says Lord Cairns, "I may safely add, that if it be shewn that any personal benefit to the bankers themselves is designed or stipulated for, that circumstance, above all others, will most readily establish the fact that the bankers are in privity with the breach of trust which is about to be committed."

On the other hand, the banker may be justified in one case in paying the money of his customer without direct authorisation from him, that is, where an acceptance of his customer's, payable at his bank, is presented to him.⁴

In the Massachusetts case of *Union Bank v. Knapp*⁵ it is laid down that a depositor has a right to inspect the books of the bank into which he has paid his money; that "the bank is bound to produce them on all proper occasions;" and that "the officers of the bank having the charge of the books are to be so far considered as agents for both parties."⁶ It is very difficult to see on what ground this right is based, since it is now well-established law that the depositor's relation to the bank is that of creditor

¹ *Hemphill v. Yerkes*, 132 Pa. St. 545, 19 Am. St. R. 607.

² Per Sir John Leach, V.C., *Keane v. Roberts*, 4 Madd. 332, at 357. Cp. *Hill v. Simpson*, 7 Ves. 152, at 166, as to the power of executors in dealing with assets; which in that case was held not to be an absolute power, when "the assignee knows the executor is applying the assets to a purpose wholly foreign to the trust." See further Lord Eldon's remarks on *Hill v. Simpson*; *M'Leod v. Drummond*, 17 Ves. 152, 169, 170. The cases are considered by Chancellor Kent in *Field v. Schieffelin*, 7 Johns. (Ch. N. Y.) 150. *Ante*, 1508.

³ *Gray v. Johnson*, L. R. 3 H. L. 1, at 11. Cp. *In re Blundell*, *Blundell v. Blundell*, 40 Ch. D. 370, at 382.

⁴ *Kymer v. Laurie*, 18 L. J. Q. B. 218.

⁵ 20 Mass. 96. In the third edition of these reports the position in the text is supported by reference to 2 Stark. Ev. 734; *Francis v. Ocean Insurance Company*, 6 Cowen (N. Y.) 404; *Bank of Utica v. Hillard*, 5 Cowen (N. Y.) 419; *Angell and Ames, Corporations*, 408, 409.

⁶ 20 Mass. at 108.

Where banker is justified in refusing to cash customer's cheque.

Where banker may pay without direct authorization.

American case laying down that the customer has a right to inspect the books of the banker.

Considered.

only. A suggestion has been made limiting this supposed right to that portion of the books of the bank in which the customer's own concerns are dealt with; yet why it should be *extended* so far as this even is almost as difficult to comprehend as the wider proposition. If the *dictum* is to be understood as only applicable to "proper occasions," any difficulty may be avoided by a just definition of that somewhat vague term, so that inspection of the debtor's account with his creditor may be demanded upon "proper occasion." Thus an undoubtedly "proper occasion" is in the course of an action when the banker is summoned as a witness; and it has been decided that, as against his customer, the banker is not protected from giving evidence as to the balance of his customer at any given date,¹ when summoned in a case between his customer and a third person.

Foster v.
Bank of
London.

In *Foster v. Bank of London*² Erle, C.J., left to the jury to say whether there was a duty on a banker not to disclose the account of one customer to another, the latter being a creditor of the former. The action of Erle, C.J., in that case was regarded by Kelly, C.B., in *Hardy v. Veasy*,³ as countenancing a legal obligation on the banker to keep reasonably secret the state of the customer's account; while in the same case, *Tassell v. Cooper*⁴ was instanced as inclining against the existence of such a duty. The Court avoided a decision of the point by assuming in the plaintiff's favour a legal duty not to disclose the customer's account except upon a reasonable and proper occasion. This was the duty laid in the declaration as amended. As the jury had found the occasion was a reasonable and proper one, the Court confined its decision to holding that the jury were the right tribunal for the decision of the reasonableness of the occasion. The inclination of the learned judge's opinion seems to be against the existence of any such duty not to disclose the account of one customer to another as of other than moral obligation.

Hardy v.
Veasy.

Banker's duty
to the payee.

The liability of the banker to his customer must not be confounded with his position with regard to the payee. If the banker refuses payment of a cheque, the payee has his remedy against the drawer. Even when the banker is in funds on account of the customer there is no breach of duty on his part with regard to the payee in not honouring the cheque presented by the payee; for

¹ *Loyd v. Freshfield*, 2 C. & P. 325, 9 D. & R. 19. This case is also cited in reference to the liability of a firm for money lent to a partner who professes to borrow it on the firm's account, and is commented on by Blackburn, J., in *Okell v. Eaton*, 31 L. T. (N. S.) 330; *Forbes's Case*, 41 L. J. Ch. 467. As to the Law of Evidence with respect to Bankers' Books, see 42 & 43 Vict. c. 11, extended 45 & 46 Vict. c. 72, s. 11 (2); *In re Marshfield*, 32 Ch. D. 499; *Arnott v. Hayes*, 36 Ch. Div. 731; *Howard v. Beall*, 23 Q. B. D. 1; *Parnell v. Wood* (1892), P. 137.

² 3 F. & F. 214.

³ L. R. 3 Ex. 107.

⁴ 9 C. B. 509.

"the right of the depositor is a *chose in action*."¹ It is immaterial whether the implied engagement upon the part of the banker is to pay the sum in gross, or in parcels, as it shall be required by the depositor. In either case the draft or cheque of the latter would not of itself transfer the debt or a lien upon it to a third person without the assent of the depositary."² On the other hand, where the banker by mistake has paid the cheque when the account of his customer is overdrawn, he cannot recover the money from the payee.³

But in America there are cases where the drawing and delivery of a cheque have been held to operate as an equitable assignment *pro tanto* of the funds in the hands of the drawee, and to give the holder the right to collect them by suit. These cases are, however, in their nature very exceptional, and will not interfere with the general rule.⁴

Bankers have sometimes claimed to recover money paid to payees of cheques drawn by customers whose accounts are overdrawn and of which fact at the moment of payment they were not actively cognisant, on the ground that the payment made was to be treated as made under a mistake of fact.⁵ But this view has not been approved. It has been pointed out that as between the banker and the payee there is no mistake, the mistake, if any, being between the banker and his customer; and a mistake in proceedings between banker and payee is irrelevant.⁶ In England, at any rate, the law is that a banker is bound to know the state of his depositor's account, and if he makes a mistake in this respect, he must abide the consequences; and the preponderance of American authority seems to be on the same side.⁷

The effect of entries in a pass-book as against the customer and the banker respectively has been somewhat controverted, and the authorities are not in all respects full and satisfactory. The chief value of the pass-book is as a check on the banker, which the de-

American cases holding cheque to operate as an equitable assignment of funds at banker's.

Contention that payment of cheque on overdrawn account is to be treated as mistake in fact,

between the banker and his customer.

Effect of entries in a pass-book.

¹ *Post*, 1644.

² *Chapman v. White*, 6 N. Y. 412, at 417; see also *Bank of the Republic v. Millard*, 10 Wall. (U. S.) 152, where it is said, at 156: "On principle, there can be no foundation for an action on the part of the holder, unless there be a privity of contract between him and the bank. How can there be such a privity when the bank owes no duty and is under no obligation to the holder?" The law is the same with regard to public agents as to private persons; *United States v. Bank of the Metropolis*, 15 Peters (U. S.) 377.

³ *First National Bank v. Devenish*, 22 Am. St. R. 394.

⁴ *Hemphill v. Yerkes*, 132 Pa. St. 545, 19 Am. St. R. 607, and note.

⁵ *Merchants' National Bank v. National Eagle Bank*, 101 Mass. 281. As to payment by mistake, see *Story*, Eq. Jur. § 110 *et seqq.*; *Kelly v. Solari*, 9 M. & W. 54, holding it not to be sufficient to preclude a party from recovering money paid by him under a mistake of fact that he had the means of knowledge of the fact unless he paid it intentionally, not choosing to investigate the fact; *Townsend v. Crowdy*, 8 C. B. (N. S.) 477.

⁶ Per Erle, C.J., *Chambers v. Miller*, 32 L. J. C. P. 30.

⁷ *Manufacturers' National Bank of Baltimore v. Swift*, 70 Md. 515, 14 Am. St. R. 381; *First National Bank v. Devenish*, 22 Am. St. R. 394.

positor may use as evidence *against* the banker.¹ There can be no doubt that entries in a pass-book are admissions by the banker, and the balancing of a pass-book is in the nature of an account stated, though not conclusive against the banker. But it is open to be impugned on the ground either of mistake or fraud. The entry of a credit is in the nature of a receipt, and therefore open to explanation by other evidence.² So an account stated would only be conclusively binding when it operates by way of estoppel through the depositor having acted upon the statement and having been actually misled, to his injury.³ The ordinary writing up of a bank book with a return of vouchers or a statement of account, it is said in an American case,⁴ precludes no one from ascertaining the truth and claiming its benefit; and this is in a subsequent case⁵ said to be "undoubtedly a correct statement of a general rule." But "without impugning the general rule, that an account rendered which has become an account stated is open to correction for mistake or fraud,"⁶ other principles come into operation, where a party to a stated account, who is under a duty, from the usages of business or otherwise, to examine it within a reasonable time after having an opportunity to do so, and give timely notice of his objections thereto, neglects altogether to make such examination himself or to have it made, in good faith, by another for him; by reason of which negligence, the other party, relying upon the account as having been acquiesced in or approved, has failed to take steps for his protection which he could and would have taken had such notice been given. In other words, parties to a stated account may be estopped by their conduct from questioning its correctness."⁷

May be
evidence
against the
depositor.

But the pass-book may also be evidence against the depositor. "Considering," says Lord Chancellor Campbell,⁸ "that this pass-book (as its name indicates) is a book which passes between the bankers and their customers, being alternately in the custody of

¹ The effect of a banker issuing a pass-book is discussed in *McCaskill v. Connecticut Savings Bank*, 60 Conn. 300, 25 Am. St. R. 323; see, too, *Gifford v. Rutland Savings Bank*, 25 Am. St. R. 744, where a savings bank having paid on presentation of a deposit book which had been stolen, and of which theft no notice was given to the banker, the banker was held not chargeable with negligence. *Janin v. London and San Francisco Bank*, 27 Am. St. R. 82, turns on possession by customer of pass-book balanced up with forged cheque debited.

² *Morse, Banks and Banking*, 48, 49. See *Manhattan Company v. Lydig*, 4 Johns. (Sup. Ct. N. Y.) 377, where on the facts a bank clerk was held the agent of the customer.

³ *Hardy v. Chesapeake Bank*, 51 Md. 562, at 589.

⁴ *First National Bank v. Whitman*, 94 U. S. (4 Otto), 343. As to the effect of a stated account and how it may be falsified, *Story Eq. Jur.* §§ 523-529.

⁵ *Leather Manufacturers' Bank v. Morgan*, 117 U. S. (10 Davis) 96, at 107.

⁶ *Perkins v. Hart*, 11 Wheat. (U. S.) 237, at 256; *Wiggins v. Burkham*, 10 Wall. (U. S.) 129, at 132.

⁷ See *post*, 1569.

⁸ *Commercial Bank of Scotland v. Rhind*, 3 Macq. (H. L. Sc.) 643, at 651.

each party, on proof of its having been in the custody of the customer and returned by him to the bankers without objection being made to any of the entries by which the bankers are credited, I think such entries may be *prima facie* evidence for the bankers, as those on the other side are *prima facie* evidence against them." Lord Selborne also, in *Blackburn Building Society v. Cunliffe, Brooks & Co.*,¹ alludes to "the doctrine that a pass-book passing to and fro is evidence of a stated and settled account."

In *Leather Manufacturers Bank v. Morgan*² it is unequivocally laid down that a depositor in a bank, who sends his pass-book to be written up, and receives it back, with entries of credits and debits, and his paid cheques as vouchers for the latter, is bound personally or by an authorised agent, and with due diligence, to examine the pass-book and vouchers, and to report to the banker, without unreasonable delay, any errors which may be discovered in them; so that if he fails to do so, and the banker is thereby misled to his prejudice, he cannot afterwards dispute the correctness of the balance shewn by the pass-book; and this view appears to be well-founded.³

Another point on which there has been some dispute is the power of a cashier⁴ to bind the banker by acts which he has been suffered to do, yet which are outside the authority of one in his position. This was considered in *Martin v. Webb*,⁵ where the facts, which were somewhat complicated, were minutely examined in arriving at the conclusion that the bankers were estopped in the particular case from denying the authority of their cashier to do acts outside the scope of his authority. The following principles were, however, enunciated in the course of the judgment of Harlan, J.:⁶

¹ 22 Ch. Div. 61, at 71, 72.

² 117 U. S. (10 Davis) 96. In *Devaynes v. Noble*, 1 Meriv. 529, Tudor, L.C.; on *Mercantile Law* (3rd ed.) 1, the custom of the dealings of London bankers is found in similar terms: that it is the duty of the customer to examine his pass-book, and if he does not, his silence is regarded as an admission that the entries therein are correct. In *Bank of England v. Vagliano Brothers* (1891), App. Cas. 107, at 116, Lord Halsbury, C., asks, as if only one answer could be given: "Was not the customer bound to know the contents of his own pass-book?" See also *Shipman v. Bank of State of New York*, 126 N. Y. 318, 22 Am. St. R. 821.

³ A gift with delivery of a pass-book was held not to make a good *donatio mortis causa*, *In re Beak's Estate*, L. R. 13 Eq. 489; it is otherwise with a deposit note, *In re Dillon*, 44 Ch. Div. 76. The law as to *donatio mortis causa* may be found in Story, Eq. Jur. 606-607 c; *Duffield v. Elwes*, 1 Bligh (N. S.), 497, and 1 Wms. Executors (9th ed.), 681-692. Entries in a pass-book communicated to the opposite parties are binding, but "entries made by a man in books which he keeps for his own private purposes are not conclusive on him until he has made a communication on the subject of those entries to the opposite party. Until that time he continues to have the option of applying the several payments as he thinks fit": *Simson v. Ingham*, 2 B. & C. 65, per Bayley, J., at 73, followed by Fry, L.J., *Janson & Co. v. Cama*, 6 Times L.R. 250.

⁴ There is apparently some difference between the use of the term "cashier" in England and in the United States. In the United States the word appears to have a more restricted meaning than in England, and the case cited must be read subject to this consideration: see *United States v. City Bank of Columbus*, 21 How. (U. S.) 356.

⁵ 110 U.S. (3 Davis), 7.

⁶ L. c., at 14.

American Law settled in the same way.

Power of cashier to bind banker.

Martin v. Webb.

Judgment of Harlan, J.

"It is clear that a banking corporation may be represented by its cashier—at least, where its charter does not otherwise provide—in transactions outside of his ordinary duties, without his authority to do so being in writing, or appearing upon the record of the proceedings of the directors. His authority may be by parol and collected from circumstances. It may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been allowed without interference to conduct the affairs of the bank. It may be implied from the conduct or acquiescence of the corporation, as represented by the board of directors. When during a series of years or in numerous business transactions he has been permitted, without objection and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between the bank and those who in good faith deal with it upon the basis of his authority, to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operations." Directors cannot in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect the officers of the bank, and to make declarations of dividends. That which they ought, by proper diligence to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

Security for overdraft. No duty to volunteer information to proposed guarantor.

Bankers often require security for their customers' overdraft. Any duty on the part of the officers of a bank to give volunteer information to a proposed guarantor (or cautioner as he is termed in Scotch law) as to the state of accounts with the principal has been emphatically negatived in a Scotch case.¹ "If," it was said, "the cautioner desires to know the state of accounts with the principal, it is his duty to ask and to inform himself, but no duty lies upon a party seeking security to give any information of that kind."

II. Banker may be agent of his customer.

II. In addition to his more common duty just discussed, a banker may be the agent of his customer. For example, he may receive money directed to be appropriated to some specific purpose, or stocks and shares with instructions to take and apply the dividends to his customer's account, or bills of exchange or cheques

¹ Young v. Clydesdale Bank, 17 Rettie 231, at 240. As to the moral duty, while affirming the absence of legal obligation, see per Lord Shand at 247, in which opinion the Lord President (Inglist) at 248, does not seem to have concurred.

to collect, or Exchequer bills to receive the interest upon and to renew. Lord Brougham, in *Foley v. Hill*,¹ appears to consider the banker in this relation as a trustee; yet it is hard to see how his position is other than that of an agent, or how the duty to collect dividends can impose other liability than that attaching to an ordinary agent.²

The effect of delivering bills and notes to a banker for collection³ must be considered not as an act imposing a burden, but rather as producing an advantage, from which profit, however small, might probably arise. "The custom of receiving notes for collection is not founded on mere courtesy, but with a view to the interests of the institution, and is the source from whence profit may and does arise."⁴ "It is not necessary to show that profits would inevitably accrue to the bank; it is enough that a reasonable expectation exists that such would be the result."⁵

Bills delivered
for collection.

In *Walton v. Shelley*⁶ it was held that one who had placed his name on negotiable paper as a party to it, is not to be heard to prove any fact which would tend to impeach or invalidate the instrument. The reason Lord Mansfield gives for his decision is expressed in the maxim of the Civil Law: *Nemo allegans suam turpitudinem est audiendus*.⁷ The same Court in *Lord Kenyon's* time in *Jordaine v. Lashbrooke*⁸ held the other way. The United States Courts have consistently followed the earlier English case; where, however, the indorsement is "for collection" the negotiability of the paper is restrained, and one who has thus indorsed it is competent to prove that he was not the owner of it, and did not mean to give title to it or its proceeds when collected.⁹

Indorsees of
negotiable
paper.

Viewing the banker as an agent, the question arises, What are his duties with respect to the collection and dealing with bills and notes placed in his hands to be collected?

Duty of banker
in respect of
the collection
(1) of bills of
exchange and
promissory
notes (2) of
cheques.

The duty of the banker differs somewhat in respect of the character of the collection he is to make. We shall accordingly proceed to consider first his duty in regard to the collection of bills of exchange and promissory notes, and secondly, his duty with regard to cheques.

¹ 2 H. L. C. 28, at 44.

² See Paley, Agency, 45, and the cases cited in *In re United Service Company, Johnston's Claim*, L. R. 6 Ch. 212; Morse, Banks and Banking (2nd ed.), 385.

³ *Smedes v. Utica Bank*, 20 Johns. (Sup. Ct. N. Y.) 372, affirmed 3 Cowen (N. Y.) 662.

⁴ *L. c.*, at 381. Cp. *Kleinwort v. Comptoir National D'Escompte de Paris* (1894), 2 Q. B. 157.

⁵ 7 T. R. 601. The controversy as to these cases is fully gone into in *Haines v. Dennett*, 12 N. H. 130. See also *Hawkins v. Cree*, 37 Pa. St. 494.

⁶ *Sweeny v. Easter*, 1 Wall. (U. S.), 166. See *Goupy v. Harden*, 7 Taunt. 159, explained in *Castrique v. Buttigieg*, 10 Moo. P. C. C. 94, at 115. This case should be referred to for the law of the liability of an agent indorsing a bill of exchange for his principal. See *Woodbridge v. Spooner*, 3 B. & Ald. 233; *Abrey v. Crux*, L. R. 5 C. P. 37; *Stott v. Fairlamb*, 52 L. J. Q. B. 420, as to the inadmissibility of evidence to contradict the effect of a negotiable instrument.

BILLS OF EXCHANGE AND PROMISSORY NOTES.¹

1. Duties of a banker in the collection of bills of exchange or promissory notes.

A banker must present bills of exchange or drafts or promissory notes for acceptance if the paper ought to be accepted; he must also present for payment at maturity; if this is refused, and the instrument requires protest he must send it to a notary for protest.²

The undertaking to collect bills binds the banker to exercise the necessary skill and diligence for the accomplishment of that object; therefore he is bound to know the commercial character of the paper he undertakes to collect; for example, if he is dealing with a bill of exchange, he is bound to know that it is entitled to three days of grace, that on the last day of grace it should be protested, and that notice must be given to the indorser, to hold him liable for the payment of the bill. If the banker does not know these and like incidents of the business he professes, he renders himself liable for the consequences of his want of knowledge. Thus, where a banker conducted himself in such an unskilful way in collecting commercial paper committed to him for collection that the indorser became discharged in consequence, the banker was held liable to his principal for the loss occasioned.³

View of Marshall, C.J., as to the mode in which the liability of the banker arises.

Marshall, C.J., considers the liability of the banker for the bill placed in his hands for collection to depend on the question whether reasonable and due diligence has been used in the performance of his duty; and to arise by the failure to demand payment in time

¹ Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), as to bills of exchange, *ss. 3, et seqq.*; as to promissory notes, *ss. 83, et seqq.* For the early history of bills of exchange and promissory notes see Goodwin v. Roberts, L. R. 10 Ex. 337, per Cockburn, C.J., at 346 *et seqq.* There is an interesting article on bills of exchange in Beckmann, History of Inventions, vol. iii. (2nd ed.) 430. Much curious information is also to be found in Macleod, Theory and Practice of Banking (4th ed.), vol. i. 168, 265, *et seqq.* For an account of the law as to the negotiability of promissory notes, see the judgment of Blackburn, J., in *Crouch v. Credit Foncier of England*, L. R. 8 Q. B. 374, at 382; and the whole subject is very thoroughly treated in its historical and antiquarian aspect by Kent in his lecture on Negotiable Paper, 3 Comm. 72, *et seqq.*, while the literature of the subject is discussed, 3 Comm. 124 *et seqq.* Promissory notes do not appear to be mentioned in Marius's Advice Concerning Bills of Exchange, published in 1651. According to Holt, C.J., in *Buller v. Crips*, 6 Mod. 29, they were not introduced into general use till near the close of the reign of Charles II. By 3 & 4 Anne, c. 9, a remedy was given upon promissory notes as upon bills of exchange. See Savary, Dictionnaire Universel de Commerce (1723), translated and extended in two immense folio volumes by Postlethwayt (1757), from which Beawes largely compiled his *Lex Mercatoria*, published in 1758; Story, Promissory Notes. Mention of Marius's work on Bills suggests Kent's reflections, in 3 Kent Comm. 126, upon it: "It is quite amusing to perceive that many of the points which have been litigated, or stated in our Courts, within the last thirty years, are to be found in Marius; so true is it that case after case, and point after point, on all branches of the law are constantly arising in the courts of justice, and discussed as doubtful or new points, merely because those who raise them are not thorough masters of their profession." *Multa ignoramus quæ nobis non laterent si veterum lectio nobis esset familiaris*: 2 Co. Inst. 166. In Law Quarterly Review, vol. ix., 70-85, there is an article on the Early History of Negotiable Instruments.

² For the duties of a Notary, *ante*, 295.

³ Georgia National Bank v. Henderson, 12 Am. R. 590.

operating to make the bill the banker's own, and thereby entitling the original owner to sue for the price.¹

Considerable dispute has arisen as to the exact obligation undertaken by the banker in the matter of the collection of bills of exchange or promissory notes.

Controversy as to the exact duty of the banker in the matter of collection. Massachusetts doctrine.

Two views have been presented, both supported by very considerable authority. The one may be thus stated: Since what is to be done by a banker employed to collect a draft payable at another place cannot be done by any of his ordinary officers or servants, but must be entrusted to a sub-agent, the risk of the neglect of the sub-agent is upon the party employing the banker, on the hypothesis that he has impliedly authorised the employment of the sub-agent, and that the incidental benefit which the banker may receive from collecting the draft in the absence of an express or implied agreement for compensation, is not a sufficient consideration from which to infer a contract to warrant against loss from the negligence of the sub-agent. This view is adopted in Massachusetts and a considerable number of other States in the American Union.

The other view, of which the courts of New York are the leading exponents in the United States, may be thus expressed: A banker receiving a draft or bill of exchange in one state for collection in another state from a drawee residing there, is liable for neglect of duty occurring in its collection, whether arising from the default of his own clerks, or from the default of his correspondent in the other state, or of an agent employed by such correspondent in the absence of any express or implied contract varying such liability. This is in accordance with the law of England, and has also been adopted by the Supreme Court of the United States as the correct expression of the law,² discriminating *Britton v. Nicolls*,³ on the ground that the notary whose action was there in question was a public officer with duties prescribed by statute.

New York doctrine.

The English law is thus stated by Lord Cottenham in *Mackersy v. Ramsay*:⁴ "If I send to my bankers a bill or draft upon another banker in London, I do not expect that they will themselves go and receive the amount and pay me the proceeds; but that they will send a clerk in the course of the day to the Clearing

The English law. *Mackersy v. Ramsay*.

¹ *Bank of Washington v. Triplett*, 1 Peters (U. S.), 25, at 31.

² *Exchange National Bank v. Third National Bank*, 112 U. S. (5 Davis), 276, at 290: "We regard as the proper rule of law applicable to this case that declared in *Van Wart v. Woolley*, 3 B. & C. 439." In the argument and judgment are collected all the authorities supporting either view of the rule discussed in this case. Chancellor Kent appears to have preferred the other view, 3 Comm. 93 n. (d).

³ 104 U. S. (14 Otto), 757.

⁴ 9 Cl. & F. 818, at 848. *Prince v. Oriental Bank Corporation*, 3 App. Cas. 325, where the relation of branch banks to the head office is considered. *Bank of Africa, Limited v. The Colonial Government*, 13 App. Cas. 215, is a decision on a colonial Act.

Van Wart v.
Woolley.

House, and settle the balances, in which my bill or draft will form one item. If such clerk, instead of returning to the bankers with the balance, should abscond with it, can my bankers refuse to credit me with the amount? Certainly not. If the bill had been drawn upon a person at York, the case would have been the same; although, instead of the bankers employing a clerk to receive the amount, they would probably employ their correspondent at York to do so; and if such correspondent received the amount, am I to be refused credit because he afterwards became bankrupt whilst in debt to my bankers? If the balance were not in favour of my bankers, the question would not arise; so that my title to the credit would depend upon the state of the account between my bankers and their correspondent."

Considered.

It has been sought¹ to deduce a different rule from *Van Wart v. Woolley*.² The agent of an American firm sued bankers for neglecting to give him notice of the non-acceptance of a bill forwarded from the American firm, and which they also had forwarded to their agent for collection. The very first words of the considered judgment of Abbott, C.J., are plain: "It is evident that the defendants (who cannot be distinguished from, but are answerable for, their London correspondents, Sir John Lubbock & Co.) have been guilty of a neglect of the duty which they owed the plaintiff, their employer," &c. For the contrary view certain expressions farther on in the same judgment are vouched:³ "The bill is drawn upon persons residing in London; the plaintiff, therefore, could not have been expected to present the bill himself; it must have been understood that he was to do this through the medium of some other person. He employed for that purpose persons in the habit of transacting such business for him and others, and upon whose punctuality he might reasonably rely. In doing this, we think that he did all that was incumbent upon him; . . . that he is personally in no default as to them, and is not answerable to them for the default of the person whom he employed under such circumstances."

It is manifest that the plaintiff was only a general agent, while the defendants were carrying on a business that implied the having facilities which the general agent did not possess. Therefore as regards his principal he came within the rule that where the employment of a sub-agent is authorised either expressly or impliedly, by usage of trade⁴ or by reason of the course of business between an agent and his principal admitting the appointment of a sub-agent, and the agent has used reason-

¹ *Morse, Banks and Banking* (2nd ed.) 413.

² *L. c.* at 446.

³ 3 B. & C. 439.

⁴ *Robinson v. Mollett*, L. R. 7 H. L. 802.

able diligence in the choice of a sub-agent of skill and care, the agent will not ordinarily be responsible for the negligence or misconduct of the sub-agent.¹ The bankers, whose business it is, make themselves responsible for the performance of what they have undertaken—that is the ordinary and usual conduct of their business.

The discrepancy between the authorities arises rather from a difference in viewing facts than from any want of agreement in any proposition of law. The point at issue is whether the bills are sent to be “transmitted” or “collected.” If it be admitted in any case that bills are to be “collected,” then the skilled agent who undertakes the business is expected to see to its performance.² Where a sub-agent is employed according to the course of trade or the nature of the transaction, the principal may treat the sub-agent as his agent, or he may go against the original agent.³

The point of view of the other class of cases, where bills are sent to be “transmitted,” is one which regards each person through whose hands the bills pass as directly liable to the owner for his own acts only.⁴

A limitation of the banker's liability arises where the banker has to employ a notary public; since the official position of a notary authorises the presumption that any one invested with it is a suitable person to discharge the duties to which he is assigned;⁵ on disproof of this presumption the banker is liable for the notary's negligence.⁷

Since the duty owed by the banker is that of a business man

¹ *Goswill v. Dunkley*, 2 Str. 680; *Cockran v. Irlam*, 2 M. & S. 301. Cp. *Speight v. Gaunt*, 9 App. Cas. 1.

² See *Bank of Washington v. Triplett*, 1 Peters (U. S.) 25; *Mechanics' Bank v. Earp*, 4 Rawle (Pa.) 384; *Allen v. Merchants' Bank*, 22 Wend. (N. Y.) 215.

³ *Story, Agency* (9th ed.), § 14; *Merchants' National Bank v. Goodman*, 109 Pa. St. 422; *Drovers' National Bank v. Anglo-American Packing Company*, 57 Am. R. 855, a banker receiving a cheque on another banker transmitted it to that banker for payment, and was held guilty of negligence for doing so, on the ground that the debtor is not the suitable agent for collecting his own debt. In *Heywood v. Pickering*, L. R. 9 Q. B. 428, similar facts were differently viewed.

⁴ *Wilson v. Smith*, 3 How. (U. S.) 763.

⁵ *Lawrence v. Stonington Bank*, 6 Conn. 521.

⁶ *Stacey v. Dane County Bank*, 12 Wis. 629, *United States Digest*, 1862, Banks, 93: “A notary public, resident at the place of the maker, may be rightfully assumed to be a fit and proper agent for this purpose;” *Shearman and Redfield, Negligence* (4th ed.), § 585, where the American authorities are collected.

⁷ *Morse, Banks and Banking*, 416, cites a case decided in *Mississippi*, *Bowling v. Arthur*, 34 Miss. 41, where the court declared “it was not sufficient proof of a notary's unfitness to shew that he was a man of habitually dissipated character, but that it must be shewn ‘that he was drunk at the time he took the note.’” He prefixes the remark: “The standard of fitness is not, of course, uniform and absolute; we cannot pretend to say what it may be in all the various States of the Union, but we have some knowledge of what it is in *Mississippi*.” Probably in this country the suggested rule would err as far as the rule rejected; besides the fact of dissipated character, it would be necessary to shew that the defendant knew, or had the means of knowledge, of it. That the man was drunk at the time of employment, though one means, is only one, of shewing this.

Banker to bestow the diligence and skill of the ordinary business man.

of reasonable skill and ordinary diligence; and as "by reasonable skill is understood such as is ordinarily possessed and exercised by persons of common capacity, engaged in the same business or employment; and by ordinary diligence is to be understood that degree of diligence which persons of common prudence are accustomed to use about their own affairs";¹ it follows that if any point of law concerning any act in the business of collecting is without authority and doubtful, the banker will be absolved if he goes wrong on proof that his conduct attained the standard of diligence and skill of the ordinary business man in that particular. He is not discharged if he goes wrong through want of care, as through misreading the bill.²

Distinction between notes left on deposit and notes left as collateral security for a loan.

A distinction exists between notes left with a banker on deposit and notes left as collateral security for a loan. In the former case it is no part of a banker's duty to sue out legal process for their enforcement.³ In the latter, he is bound to take every step to fix the liability of the parties, he must resort to the ordinary means amongst merchants, and further, if necessary, bring an action with reasonable diligence and skill; if he fails in his duty the debtor may be discharged.⁴

a. Presentment of bill of exchange.

a. A bill of exchange⁵ must be presented to the drawee for acceptance⁶ when it is drawn payable at a certain period after sight;⁷ or when the bill expressly stipulates for acceptance; or

¹ Per Shaw, C.J., *Mechanics' Bank v. Merchants' Bank*, 47 Mass. 13, at 26.

² *Bank of Delaware County v. Broomhall*, 38 Pa. St. 135.

³ *Crow v. Mechanics and Traders' Bank*, 12 La. Ann. 692.

⁴ *Wakeman v. Gowdy*, 10 Bosw. (Sup. Ct. N. Y.) 208; *Story, Promissory Notes*, § 284.

⁵ As to the form and definition of a bill of exchange, *Chamberlain v. Young* (1893), 2 Q. B. 206, where an instrument made payable to "— order" was held to mean payable to "my order," i.e., of the drawer. "The person who draws a bill of exchange, and his addressee who accepts it, can never, according to the principles of the law merchant, be liable otherwise than in their respective characters of drawer and acceptor. In other cases the character and liability of parties to a bill cannot be ascertained without the aid of proof, as, for instance, when a dispute arises in regard to the order of time in which indorsements were made upon a bill. On the other hand, it is undoubtedly competent for parties to a bill, by contract *inter se*, express or implied, to alter and even invert the positions and liabilities assigned to them by the law merchant. The drawer and acceptor of a bill may agree that, as between themselves, the acceptor shall have the rights of a drawer, and that the drawer shall be subject to the liabilities of an acceptor, and that agreement when proved will be binding upon them both, although it can have no effect upon the obligations to third parties interested in the bill imposed upon them by the law merchant": per Lord Watson, *Steele v. McKinlay*, 5 App. Cas. 754, at 778. As to a promise to accept and the estoppels worked by acceptance or payment, see Mr. Holmes's note, 3 Kent, Comm. (12th ed.), 85.

⁶ *Macdonald v. Whitfield*, 8 App. Cas. 733. When a party to a bill is discharged from his liability thereon by reason of the holder's omission to perform his duties as to presentment for acceptance or payment, protest or notice of dishonour such party is also discharged from liability on the debt or other consideration for which the bill was given, *Bridges v. Berry*, 3 Taunt. 130; *Soward v. Palmer*, 8 Taunt. 277; *Peacock v. Pursell*, 14 C. B. N. S. 728; *Cambefort v. Chapman*, 19 Q. B. D. 229, at 233, but see *Wegg-Prosser v. Evans* (1895), 1 Q. B. 108, and *ante*, 200. As to qualified acceptance, see *Meyer v. Decroix* (1891), App. Cas. 520.

⁷ 45 & 46 Vict. c. 61, s. 39, sub-s. 1; *Campbell v. French*, 6 T. R. 200; *Holmes*

where it is drawn payable elsewhere than at the residence or place of business of the drawee.¹ In no other case is the presentment for acceptance necessary to charge any party to the bill.²

The rules as to presentment for acceptance are set out in the Bills of Exchange Act, 1882.³ Presentment is dispensed with "where, after the exercise of reasonable diligence, such presentment cannot be effected."⁴

Rules relating to presentment.

Where presentment is necessary and the bill is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time; if he do not do so, the drawer and all prior indorsers are discharged.⁵ In *Shute v. Robins*⁶ a bill drawn by bankers in the country on their correspondents in London, payable after sight, was indorsed to the traveller of the plaintiffs. He kept it a week, then forwarded it to the plaintiffs; they kept it two days, then transmitted it for acceptance. In the meantime the drawers had become bankrupt, and the drawees refused to accept. An action was brought, and in summing up to the jury, after observing that the question was one of mixed law and fact, Lord Tenterden, C.J., thus proceeds:⁷ "Whatever strictness may be required with respect to common bills of exchange, payable after sight, it does not seem unreasonable to treat bills of this nature, drawn by bankers on their correspondents, as not requiring immediate presentment, but as being retainable by the holders for the purpose of using them within a moderate time (for indefinite delay, of course, cannot be allowed), as part of the circulating medium of the country." The jury found that the delay in this case was not unreasonable.

Presentment must be within a reasonable time.

Opinion of Lord Tenterden, C.J.

To the same effect is the judgment of Tindal, C.J., in *Mellish v. Kerrison*, 2 Taunt. 323. As to when a bill payable after sight is negotiated, see s. 40.

Opinion of Tindal, C.J.

¹ 45 & 46 Vict. c. 61, s. 39, sub-s. 2.

² 45 & 46 Vict. c. 61, s. 39, sub-s. 3. *Ramohurn Mullick v. Radakissen*, 9 Moo. P. C. C. 46, at 65, 66.

³ 45 & 46 Vict. c. 61, s. 41; "holder" is defined, sec. 2. Cp. *Morrison v. Buchanan*, 6 C. & P. 18. The presentment must be either to the drawee or his authorized agent, *Cheek v. Roper*, 5 Esp. (N.P.) 175. A bill should be presented for acceptance before maturity, *O'Keefe v. Dunn*, 6 Taunt. 305, at 307.

⁴ The bill must be presented, though the holder may know that the drawee will not accept: *Hill v. Heap*, D. & R. (N. P.) 57; and during the usual banking hours: *Parker v. Gordon*, 7 East 385; *Jameson v. Swinton*, 2 Taunt. 224; but presentment after the usual hours is sufficient if there is somebody at the place who sees the bill and gives an answer, but not otherwise: *Henry v. Lee*, 2 Chit. (K. B.) 124; *Bynner v. Russell*, 7 Moore (C. P.) 267; *Smith v. New South Wales Bank* (1872), 8 Moo. P. C. C. N. S. 443, at 461-463; 3 Kent Comm. 96.

⁵ 45 & 46 Vict. c. 61, s. 40; 3 Kent Comm. 83. Any *bond fide* holder of a negotiable instrument, or any one lawfully in possession of it for the purpose of payment, may present it for payment at maturity, *Leftley v. Mills*, 4 T. R. 170. Possession is sufficient *prima facie* evidence of right to present, *Bachelor v. Priest*, 29 Mass. 398, at 406, citing *Bayley*, Bills of Exchange (6th ed.), at 139.

⁶ Moo. & M. 133, 3 C. & P. 80. See *Fry v. Hill*, 7 Taunt. 397.

⁷ Moo. & M. at 136.

v. Rawdon.¹ The bill must be forwarded within a reasonable time under all the circumstances of the case, and there must be no unreasonable or improper delay. "Whether there has been in any particular case reasonable diligence used, or whether unreasonable delay has occurred, is a mixed question of law and fact to be decided by the jury acting under the direction of the judge, upon the particular circumstances of each case."²

What is an unreasonable time.

"The law," says Lord Cairns,³ discussing what is to be regarded as "unreasonable time," where an agent has to present, as between him and his principal, "does not lay down as an absolute rule any time which is reasonable or unreasonable, as between persons standing in this relation, for the execution by the agent of the duty which is imposed upon him. But inasmuch as the object of the transmission of a bill of this kind from principal to agent is to obtain the acceptance and payment of the bill, or, if it is not accepted, to guard the rights of the principal against the drawer in case recourse is to be had to the drawer, their Lordships are of opinion that the duty of the agent must be measured by those considerations, and that the duty of the agent is to obtain acceptance of the bill, if possible, but not to press unduly for acceptance in such a way as to lead to a refusal, provided that the steps for obtaining acceptance or refusal are taken within that limit of time which will preserve the right of his principal against the drawer."

Distinction between a bill circulating and a bill locked up.

There is, however, a difference between a bill circulating and a bill locked up. "If," says Buller, J., "a bill drawn at three days' sight were kept out in that way [in circulation] for a year, I cannot say that there would be *laches*. But if, instead of putting it in circulation, the holder were to lock it up for any length of time, I should say that he would be guilty of *laches*."⁴

¹ 9 Bing. 416.

² *L. c.* at 423. For a case where the delay in presentment was held unreasonable, see *Straker v. Graham*, 4 M. & W. 721; where held reasonable, *Goupy v. Harden*, 7 Taunt. 159.

³ *Bank of Van Diemen's Land v. Bank of Victoria*, L. R. 3 P. C. 526, at 542. *Cox v. National Bank*, 100 U. S. (10 Otto) 704. The French Code de Commerce, Liv. 1. 8. 11, requires a European bill, i.e., one drawn from the continent or islands of Europe and payable within the European possessions of France, to be presented within six months from the date it bears, and in default the holder loses all recourse over. The rule as to reasonable time is well stated by Bigelow, J., in *Prescott Bank v. Caverly*, 73 Mass. 217, at 221: "Ordinarily, the question whether a presentment was within a reasonable time is a mixed question of law and fact, to be decided by the jury under proper instructions from the Court. And it may vary very much according to the particular circumstances of each case. If the facts are doubtful, or in dispute, it is the clear duty of the Court to submit them to the jury. But when they are clear and uncontradicted, then it is competent for the Court to determine whether the reasonable time required by law for the presentment has been exceeded or not." See Bayley, *Bills of Exchange* (6th ed.), 230, and note. Also *Bills of Exchange Act, 1882* (45 & 46 Vict. c. 61), s. 40, sub-s. 3.

⁴ *Mullman v. D'Eguino*, 2 H. Bl. 565, at 570. See the explanation of this by Tindal, C.J., in *Mellish v. Rawdon*, 9 Bing. 416.

The distinction has also been stated as between bills payable at a certain number of days after date and bills payable at a certain number of days after sight. In the case of the former the holder is bound to use due diligence to present the bill at maturity. In the case of the latter, if he chooses he may put the bill into circulation instead of immediately presenting it. It is then uncertain when it may be presented, and the circumstances must determine the reasonableness or unreasonableness of the delay.¹

Again, there is a difference in the law as to promissory notes. "If," says Parke, B.,² a promissory note payable on demand is, after a certain time, to be treated as overdue, although payment has not been demanded, it is no longer a negotiable instrument. But a promissory note payable on demand is intended to be a continuing security. It is quite unlike the case of a cheque which is intended to be presented speedily." From what fell from Lord Cairns in the *Chartered Mercantile Bank of India, &c. v. Dickson*³ the law still seems not to be finally settled. There it was contended that the law with regard to the time for the presentation of a promissory note payable upon demand or endorsed over, requires a presentation to the maker within a reasonable time. Lord Cairns said: "The cases of bills of exchange and of cheques stand upon a footing obviously different, and the law as to them does not by any means of necessity decide the present question. We have been referred to some American authorities in support of the proposition that the question to be determined is always whether the presentation for payment was made within a reasonable time. Their Lordships think it better to assume, as was contended by the respondent, that this is a proper definition of the question to be considered. They would be unwilling to preclude any argument upon that in any other case when there might be an opportunity of considering it more fully." Yet if this case should ever arise, the prospects of any decision overruling the judgment of the Court of Exchequer and the immense authority of Parke, B., which are referred to in the principal text-books,⁴ without any comment as settling the law, would appear extremely slight.

Distinction drawn by Parke, B., between promissory notes and cheques.

Chartered Mercantile Bank of India, &c., v. Dickson.

Lord Cairns treats the question as an open one.

¹ *Goupy v. Harden*, 7 Taunt. 159.

² *Brooks v. Mitchell*, 9 M. & W. 15, at 18, and in the argument the same learned judge said: "A promissory note payable on demand is current for any length of time"; nevertheless the Statute of Limitation runs from the date thereof *In re George, Francis v. Bruce*, 44 Ch. D. 627. In *Tinson v. Francis*, 1 Camp. 19, Lord Ellenborough, C.J., says: "After a bill or note is due it comes disgraced to the indorsee;" and Buller, J., in *Brown v. Davis*, 3 T. R. 80, says that to take an overdue note or bill "is out of the common course of dealing." But these cases must be treated as overruled, *Charles v. Marsden*, 1 Taunt. 224, at 225; *Sturtevant v. Ford*, 4 M. & G. 101. The authorities are considered in *In re Overend, Gurney & Co., Ex parte Swan*, L. R. 6 Eq. 344, at 358. See Daniel, *Negotiable Instruments* (4th ed.), § 610.

³ L. R. 3 P. C. 574, at 579. See *In re Rutherford, Brown v. Rutherford*, 14 Ch. Div. 687.

⁴ *Chalmers, Bills of Exchange* (3rd ed.), 108, 229, 248; *Byles, Bills of Exchange*

American
authorities.

The effect of the American authorities may be summed up in the words used in *Losee v. Dunkin*:¹ "There is no precise time at which such a note [a note payable on demand] is to be deemed dishonoured." "The demand must be made in reasonable time, and that will depend upon the circumstances of the case and the situation of the parties."

Holder of bill
presenting for
acceptance
before maturity
must give
notice to all
parties in case
of dishonour.

In *Blesard v. Hirst*² it was determined that though it was not necessary that the holder should present a bill for acceptance before it became due³ yet if he do so he must give immediate notice of the refusal to accept to all parties to the bill to whom he desires to resort for payment in case it is dishonoured; and this was accepted as stating the law correctly in *Goodall v. Dolley*; ⁴ if he fails to do this the indorser is discharged; and in the last-mentioned case it was added that a subsequent proposal by the indorser to pay the bill by instalments, made without knowledge of the indorsee's *laches* is not a waiver of the want of notice.

Proposal to
settle made
without know-
ledge of
holder's
laches no
waiver of
indorser's
rights.

Distinction
between duty
of owner and
of agent in
presenting
bill.

There is a distinction to be observed in relation to the presenting a bill for acceptance between the case of the owner of a draft and his agent for collection. In the case of the owner he is not bound to present a draft payable at a date certain, for acceptance before that day. But the agent must act with due diligence to get the draft accepted as well as paid; and he has not the discretion and latitude of time given him that the owner has, and he is responsible for all damage sustained by the owner for any unreasonable delay of which he is guilty.⁵

Immediate
answer not
required from
the drawee.

The drawee is not required to say straightway whether he will accept or refuse. In *Bank of Van Diemen's Land v. Bank of Victoria*,⁶ their Lordships were prepared to hold that it was "the ordinary custom of merchants to leave a bill for acceptance twenty-four hours with the person upon whom it is drawn;" so that, where the twenty-four hours would expire after business hours on

(8th ed.), 156, 194; Chitty, Bills of Exchange (11th ed.), 163, 257; Bullen and Leake, Prec. of Plead. (3rd ed.), 109, 538; and in so elementary a book as Broom's Common Law (4th ed.), 482.

¹ 7 Johns. (Sup. Ct. N. Y.) 70.

² 5 Barr. 2670.

³ Notice of dishonour is not necessary where the drawee is, and at the time of the drawing of the bill was without effects of the drawer in his hands: *Bickerdike v. Bollman*, 1 T. R. 405. See the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 50; *Carew v. Duckworth*, L. R. 4 Ex. 313, and what Bramwell, B., says as to cheques, at 316; *Turner v. Samson*, 2 Q. B. D. 23.

⁴ 1 T. R. 712. As to the time from which the Statute of Limitations begins to run in the case of a bill so presented and refused, whether from the time of presentment or that of payment, see *Whitehead v. Walker*, 9 M. & W. 506, holding time to run from the former period.

⁵ *Exchange National Bank v. Third National Bank*, 112 U. S. (5 Davis), 276, at 291, citing 3 Kent, Comm. 82, and Chitty, Bills of Exchange (13th Am. ed.), 272, 273.

⁶ L. R. 3 P. C. 526, at 543.

a Saturday, "it was a natural and justifiable act to postpone the demand for an answer" ¹ till Monday.²

The holder of a bill ~~may~~ refuse to take a qualified acceptance, ^{Qualified acceptance.} and may treat a bill accepted in a qualified manner as non-accepted.³

β. A bill must be also presented for payment ^{β. Presentment for payment.} 'on penalty of discharging the drawer and indorsers.'⁴

If the bill is not payable on demand, presentment must be made on the day it falls due.⁵ If the bill is payable on demand, then presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement to render the indorser liable.⁶ Reasonable time is, we have seen when discussing presentment for acceptance most often a mixed question of law and fact.⁶ *Quam longum esse debet non definitur in jure, sed pendet ex discretione judiciariorum.*⁹

In some American cases¹⁰ reasonableness of notice or demand, or due diligence when the facts are not in dispute, has been held ^{American Cases.}

¹ *L. c.*, at 547. Lord Cairns, in the course of his judgment, says, at 546, of the term "excusable neglect": "it must mean this,—that an excuse valid in law existed from that which, *primâ facie*, and if the excuse did not exist, would in law be a neglect."

² In *Ingram v. Foster*, 2 Sm. (K. B.) 242, it was said by Lord Ellenborough, C. J., that the law of merchants at Hamburg, and which prevails all over the continent of Europe, is that when a bill is kept more than twenty-four hours after presentation for acceptance it amounts to an acceptance; but see as to this the Bills of Exchange Act, 1882, s. 42. Lord Ellenborough intimates a desire to have the point, amongst others, argued whether, if the holder allows further time, he should not inform his indorser, and put him in as good a situation as himself.

³ 45 & 46 Vict. c. 61, sec. 44, sub-s. (1); as to rights where there is a qualified acceptance, see ss. 19 and 52.

⁴ See Mr. Holmes's note on Place of Presentment to 3 Kent, Comm. (12th ed.) 96.

⁵ 45 & 46 Vict. c. 61, s. 45. "It is now too late," says Lord Ellenborough, (*Esdaile v. Sowerby* (1809), 11 East 114), "to contend that the insolvency of the drawer or acceptor dispenses with the necessity of a demand of payment, or of notice of the dishonour." See 45 & 46 Vict. c. 61, s. 48; *Nicholson v. Gouthit*, 2 H. Bl. 609. Excuses for delay or non-presentation for payment are regulated now by 45 & 46 Vict. c. 61, s. 46.

⁶ 45 & 46 Vict. c. 61, s. 45, sub-s. 1.

⁷ 45 & 46 Vict. c. 61, s. 45, sub-s. 2. Cp. *Patience v. Townley*, 2 Sm. (K. B.) 223. A note payable on demand is not so strictly construed overdue as other instruments: *Camidge v. Allenby*, 6 B. & C. 373; as to bankers' cash notes, *Rogers v. Langford*, 1 Cr. & M. 637, 3 Tyrw. 654; *Robson v. Oliver*, 10 Q. B. 704; 45 & 46 Vict. c. 61, s. 36. In *Bowes v. Howe*, 5 Taunt. 30, an allegation in the declaration that the makers became insolvent and "ceased and wholly declined and refused to pay" any of their notes, was held insufficient, as not being equivalent to an allegation of presentment. The fact that the holder has reason to believe that the bill or note will be dishonoured does not dispense with the necessity of presenting for payment; so that not even the bankruptcy or insolvency of the drawee or maker will avail as an excuse for not presenting; for many means may remain of obtaining payment by the assistance of friends or otherwise, *Sands v. Clarke*, 8 C. B. 751; *In re East of England Banking Company*, L. R. 4 Ch. 14.

⁸ *Ante*, 1535; 45 & 46 Vict. c. 61, s. 45, sub-s. 2; *Manwaring v. Harrison*, 1 Stra. 508.

⁹ Co. Litt. 56 b.

¹⁰ *Aymar v. Beers*, 7 Cowen (N. Y.) 705; *Bank of Columbia v. Lawrence*, 1 Peters (U. S.) 578, where the rule applicable when the party, to whom notice is to be given, has no regular place of business in the city or town where the holder resides, yet receives his letters there, is considered. *Remer v. Downer*, 23 Wend. (N. Y.) 620.

a question of law. The difficulty is to dissociate it from the facts, and the case will not often arise where it is possible to dispense with the assistance of the jury.¹

How to be made.

Presentment for payment² must be made by the holder, or by some person authorized to receive payment on his behalf, at a reasonable hour on a business day at the proper place,³ either to the person designated by the bill as payer, or to some person authorised to pay or refuse payment on his behalf, if with the exercise of reasonable diligence such person can there be found.

General rule as to presentment for payment.

The general rule has also been thus expressed:⁴ A man taking a bill or note payable on demand, or a cheque, is not bound, laying aside all other business, to present or transmit it for payment [on] the very first opportunity. It has long since been decided in numerous cases that, though the party by whom the bill or note is to be paid live in the same place, it is not necessary to present the instrument for payment till the morning next after the day on which it was received.⁵ And later cases have established that the holder of a cheque has the whole of the banking hours of the next day within which to present it for payment.⁶

Where parties to bill live in the same place.

Where the parties live in the same place a bill of exchange ought to be presented the next day after the payee has received it. If it has to be sent by post to be presented, it ought to be posted on the day next after the day on which it was received, and it is then the duty of the person who receives it by post to present it on the day next following the day on which it is received.⁷

Exceptions.

This is not so with promissory notes. In the case of these it is a question for the jury whether the delay in presentment is in all the circumstances reasonable or unreasonable.⁸ Bills of exchange and cheques, we have already noted, stand upon a footing obviously different. Bank-notes and bankers' cash-notes⁹ differ again, since they are intended to circulate as money, and are not intended as a continuing security in the hands of any single owner.

Camidge v. Allenby.

The leading case dealing with this class of securities is *Camidge*

¹ 3 Kent, Comm. (13th ed.) 105, n (2¹). Where sudden illness or death of or accident to the holder or his agent prevents the presentment of the bill or note in due season, or the communication of notice, the delay is excused, provided that presentment is made and notice given as promptly afterwards as the circumstances permit: *Daniel* *Negotiable Instruments* (4th ed.), § 1125.

² 45 & 46 Vict. c. 61, s. 45, sub-s. (3). *Post*, 1546.

³ As to what is the proper place at which to present a bill, see 45 & 46 Vict. c. 61, s. 45, sub-s. (4).

⁴ Byles, *Bills of Exchange* (15th ed.) 280.

⁵ *Ward v. Evans*, 2 Ld. Raym. 928; *Moore v. Warren*, 1 Str. 415.

⁶ *Robson v. Bennett*, 2 Taunt. 388; *Moule v. Brown*, 4 Bing. N. C. 266.

⁷ Byles, *Bills of Exchange* (15th ed.) 281.

⁸ *Chartered Mercantile Bank of India, &c. v. Dickson*, L. R. 3 P. C. 574, at 579; 45 & 46 Vict. c. 61, s. 86. As to cancellation without authority by an agent employed to collect a bill, *Bank of Scotland v. Dominion Bank (Toronto)*, (1891), App. Cas. 592.

⁹ *Shute v. Robins*, 3 C. & P. 80.

v. Allenby.¹ There Bayley, J., lays down the general rule applicable to negotiable instruments to be "that the holder of such an instrument is to present promptly, or to communicate without delay notice of non-payment, or of the insolvency of the acceptor of a bill or the maker of a note, for a party is not only entitled to knowledge of insolvency, but to notice that in consequence of such insolvency he will be called upon to pay the amount of the bill or note."²

Rule applicable to negotiable instruments formulated by Bayley, J.

The rule as to bank-notes is declared to be that, since they are intended for circulation, the holder is not bound *immediately*³ to circulate them or to send them into the bank for payment, but he is bound to do one or the other "within a reasonable time after he had received them;"⁴ so that where notes of a Huddersfield bank, which had stopped payment the same morning at eleven o'clock (though the fact was not known to either payer or payee), were handed over to a creditor at York on Saturday afternoon at three o'clock in payment of an account, and were neither circulated nor presented for payment, and a week after the payee required

Rule as to bank-notes.

¹ 6 B. & C. 373, at 383; *Robinson v. Hawksford*, 9 Q. B. 52. "I have before said, the holder of a bill of exchange is not, *omissis omnibus aliis negotiis*, to devote himself to giving notice of its dishonour. It is enough if this be done with reasonable expedition. . . . Here a day has been lost. . . . If a party has an entire day he must send off his letter conveying the notice within post time of that day;" per Lord Ellenborough, C.J., *Smith v. Mullett*, 2 Camp. 208, at 209. See now 45 & 46 Vict. c. 61, sec. 49, sub-s. (12).

² See *Robeson v. Oliver*, 10 Q. B. 704; *James v. Holditch*, 8 D. & R. 40. As to what constitutes negotiability, see *Goodwin v. Roberts*, 1 App. Cas. 476; *Crouch v. Credit Foncier of England*, L. R. 8 Q. B. 374. A definition of negotiable instrument is given by Bowen, L.J., as follows: *Simmons v. London Joint Stock Bank* (1891), 1 Ch. 270, at 294: "A negotiable instrument payable to bearer is one which, by the custom of trade, passes from hand to hand by delivery, and the holder of which for the time being, if he is a *bona fide* holder for value without notice, has a good title, notwithstanding any defect of title in the person from whom he took it. A contractual document, in other words, may be such that, by virtue of its delivery, all the rights of the transferor are transferred to and can be enforced by the transferee against the original contracting party, but it may yet fall short of being a completely negotiable instrument, because the transferee acquires by mere delivery no better title than his transferor. "What is negotiability?" says Strong, J., in *Shaw v. Railroad Company*, 101 U. S. (11 Otto) 557, at 562, "It is a technical term derived from the usage of merchants and bankers in transferring, primarily, bills of exchange and afterwards promissory notes. At common law no contract was assignable, so as to give an assignee a right to enforce it by suit in his own name. To this rule bills of exchange and promissory notes, payable to order or bearer, have been admitted exceptions, made such by the adoption of the law merchant. They may be transferred by indorsement and delivery, and such a transfer is called negotiation. It is a mercantile business transaction, and the capability of being thus transferred, so as to give to the indorsee a right to sue on the contract in his own name is what constitutes negotiability." See the judgment of Holroyd, J., in *Wookey v. Pole*, 4 B. & Ald. at 9, pointing the distinction between money and instruments which are the representatives of money and other forms of property. *Post*, 1614. A commercial guaranty is not a negotiable security, 2 Kent Com. 549 n. c. *Tatam v. Haalar*, 23 Q. B. D. 345; *Goodall v. The Australian Freehold Banking Corporation*, 16 Vict. L. R. 29. In an action by an indorsee on a bill of exchange, if it appear that a prior party was defrauded out of it, the plaintiff is bound to prove the consideration he gave for it: *Rees v. Marquis of Headfort*, 2 Camp. 574, 45 & 46 Vict. c. 61, s. 30, sub-s. (2).

³ *Shute v. Robins*, 3 C. & P. 80. If the notes have to be transmitted, they may be cut in halves, and sent in different parcels and on different days: *Williams v. Smith*, 2 B. & Ald. 496.

⁴ 6 B. & C. at 382.

the payer to take them back and to pay the amount of them, the Court of King's Bench held that, "in consequence of the negotiable nature of the instruments, it became his [the payee's] duty to give notice to the party who paid him the notes, that the bankers had become insolvent, and that he, the plaintiff, would resort to the defendant for payment of the notes; and it would then have been for the defendant to consider whether he could transfer the loss to any other person, for unless he had been guilty of negligence, he might perhaps have resorted to the person who paid him the notes."¹ The plaintiff accordingly failed in the performance of his duty, and the defendant was discharged.²

Right of resort dependent on indorsement.

This right of resort, in the case of bills of exchange and of cheques, is dependent upon indorsement. By the Bills of Exchange Act, 1882,³ a transferor by delivery is not liable on the instrument. He is liable to his immediate transferee, being a holder for value, on an implied warranty connected with, but collateral to, the instrument, to the effect that the instrument is what it purports to be, that he has a right to transfer it, and that at the time of transfer he was not aware of any fact that rendered it worthless.⁴

Holder of bill of exchange for value not disentitled to recover by reason of negligence.

Where value is given for a bill of exchange, carelessness, negligence, or foolishness is not enough to disentitle the holder to recover if there is anything wrong with it. They are matters tending to show the existence of dishonesty, but do not in themselves constitute matter of defence. To do this it must be shown that the person who gave value for the bill was affected with notice that there was something wrong about it when he took it. In that case he takes it at his peril. The real point is, did he know there was something wrong about it. If "he refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind—I suspect there is something wrong, and if I ask questions and make further inquiry, it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recover. I think that is dishonesty."⁵ Where that is found no right can avail. As

¹ 6 B. & C. 382.

² See *The Feronia*, L. R. 2 A. & E. 65, at 79, for the law as to the consequences of neglect to give notice.

³ Section 58, sub-sec. 2. Cp. *ex parte Roberts*, 2 Cox (Ch.) 171; *Fenn v. Harrison*, 3 T. R. 757; *Ex parte Bird*, 4 De G. & S. 273. See sec. 23, also *Lindus v. Bradwell*, 5 C. B. 583, at 591; *Trueman v. Loder*, 11 A. & E. 589, at 594; *Pooley v. Driver*, 5 Ch. D. 458.

⁴ Section 58, sub-sec. 3. The Statute of Limitations begins to run immediately on payment being made, though the instrument is forged: *Bree v. Holbech*, 2 Doug. 654; *Leather Manufacturers' Bank v. Merchants' Bank*, 128 U. S. (22 Davis) 26.

⁵ Per Lord Blackburn, *Jones v. Gordon*, 2 App. Cas. 616, at 629. Cp. *Tatam v. Haslar*, 23 Q. B. D. 345. See also *Foster v. Pearson*, 1 Cr. M. & R. 849, approved in *London Joint Stock Bank v. Simmons* (1892), App. Cas. 201. In America there is great mass of authority the other way; this is collected in a note to *People's Bank v. Franklin Bank*, 17 Am. St. R. 384. See *post*, 1549.

Pollock, C.B., says:¹ "By the law of England fraud cuts down everything. I believe that is the common mode of expressing a legal proposition known to every lawyer in Westminster Hall. The law sets itself against fraud to the extent of breaking through almost every rule, sacrificing every maxim, getting rid of every ground of opposition which may be presented, so as to prevent it from succeeding. So much does the law of England abhor fraud that even the maxim that you can never aver against the record is not allowed to prevail if fraud can be shewn; and probably there is no maxim more stringent than that you cannot aver against the record. The law will not allow technical difficulties of any kind to interfere to prevent the success of right and justice and truth."

Pollock, C.B., in *Rogers v. Hadley* on the effects of fraud.

The consequences of fraud, however, affect a bill no further than its acquisition. To trace back its course until fraud is found in some earlier transaction during its currency will not avail; for to do this would, in the words of Lord Kenyon,² "be at once to paralyze the circulation of all the paper in the country, and with it all its commerce." Abbott, C.J., endeavoured to establish a different rule in *Gill v. Cubitt*,³ but the King's Bench returned to the earlier rule in *Goodman v. Harvey*,⁴ and the rule as stated by Lord Kenyon may be considered fixed by the decision in *Raphael v. Bank of England*.⁵

Fraud in the acquisition of a bill.

The question may then arise of what circumstances are sufficient to amount to proof of *mala fides*. "I agree," said Parke, B.,⁶ "that 'notice and knowledge' means not merely express notice, but knowledge or the means of knowledge to which the party wilfully shuts his eyes"; and Lord Herschell, in *London Joint Stock Bank v. Simmons*,⁷ says: "If there is anything to arouse suspicion, to lead to a doubt whether the person purporting to transfer them [negotiable instruments] is justified in entering into the contemplated transaction," "the existence of such suspicion or doubt would be inconsistent with good faith. And if no inquiry were made, or if on inquiry the doubt were not removed and the suspicion dissipated, I should have no hesitation in holding that good faith was wanting in a person thus acting." If, then, the circumstances are of such a character as to create either a presumption of fraud or to suggest a right in any prior party, they operate as notice to the transferee.

What circumstances are sufficient to raise a case of fraud.

¹ *Rogers v. Hadley*, 32 L. J. Ex. 241, at 248.

² *Lawson v. Weston*, 4 Esp. (N. F.) 56.

³ 3 B. & C. 466. The history of the decisions is given in *Phelan v. Moss*, 67 Pa. St. 59.

⁴ 4 A. & E. 870.

⁵ 17 C. B. 161. See per Field, J., in *London and County Banking Company v. Groome*, 8 Q. B. D. 288, at 294. *Post*, 1615. The preponderating rule in America is the same as the rule in England; nevertheless *Gill v. Cubitt* is followed in some Courts, Daniel, *Negotiable Instruments* (4th ed.), § 775.

⁶ *May v. Chapman*, 16 M. & W. 355, at 361.

⁷ (1892), App. Cas. 201, at 223. *Post*, 1619.

Transferee of
bill after
dishonour.

The general proposition, that a person who takes an accommodation bill after it has been dishonoured cannot be in a better situation than the drawer as against the acceptor, is no longer law;¹ for negotiable paper does not lose its negotiability by being dishonoured either for non-payment or non-acceptance;² but the indorsee or transferee for value of a bill of exchange after dishonour has "a right to recover against the acceptor whether the bill was given for value or not, unless there be an equity attached to the bill itself amounting to a discharge of it."³ And further: "the person who takes up a bill *supra protest* for the honour of a particular party to the bill, succeeds to the title of the person *from whom*, not *for whom*, he receives it, and has all the title of such person to sue upon it, except that he discharges all the parties to the bill subsequent to the one for whose honour he takes it up, and that he cannot himself indorse it over."⁴ The absence of indorsement, however, does not preclude the transferee from suing; and if a transferee has given value for a bill, he is still entitled to recover, even though the bill is an accommodation bill, and has not been indorsed to the transferee.⁴ In the United States it has further been decided that when a bill of exchange or promissory note is proved to have been parted with for value, the amount of the consideration is immaterial except as it bears on the question of actual or constructive notice.⁵

Rights of
holder of
overdue bill of
exchange.

The holder of an overdue bill of exchange or promissory note is, however, held to take it at his peril, and to stand in no better position than those from whom he takes it, as to any equities attaching between those from whom he takes it and the acceptor;⁶ for these instruments are usually current only during the period before they become payable, so that negotiation of them afterwards is out of the ordinary and usual course of dealing.⁷

Case of a
cheque differs.

The case of cheques is different.⁸ There the jury has to decide

¹ *Tinson v. Francis*, 1 Camp. 19, and *Ex parte Lambert*, 13 Ves. 179, which maintain the proposition, must be taken to be overruled by a string of cases, beginning with *Charles v. Marsden*, 1 Taunt. 224, down to *In re European Bank, Ex parte Oriental Commercial Bank*, L. R. 5 Ch. 358, at 362, where *Ex parte Swan*, L. R. 6 Eq. 344, at 359, 360 is referred to. See, however, note to *Tinson v. Francis*, 10 Rev. R. 617, and 45 & 46 Vict. c. 61, s. 36. The American rule may be found, *Daniel, Negotiable Instruments* (4th ed.), § 786.

² *Thompson v. Perrine*, 106 U. S. (16 Otto) 589, at 593.

³ *Per Malins, V.C., In re Overend, Gurney & Co., Ex parte Swan*, L. R. 6 Eq. 344, at 367, where assent is also given to the proposition, that "a person who does takes up a bill for the honour of a particular person *supra protest*, cannot himself indorse it over. See Bills of Exchange Act 1882 (45 & 46 Vict. c. 61), s. 68.

⁴ *Hood v. Stewart*, 17 Rettie 749. See 45 & 46 Vict. c. 61, sec. 31.

⁵ *King v. Doane*, 139 U. S. (32 Davis) 166. As to notice, see *post*, 1636.

⁶ *Barough v. White*, 2 C. & P. 8, and note citing *Taylor v. Mather*, 3 T. R. 83 n; *Brown v. Davis*, 3 T. R. 80; and *Bayley, Bills of Exchange*, 118; see *Alcock v. Smith* (1892), 1 Ch. 238; *Daniel, Negotiable Instruments* (4th ed.), § 782.

⁷ *Down v. Halling*, 4 B. & C. 330, 2 C. & P. 11. As to this case see *per Lord Brougham, Bank of Bengal v. Fagan*, 7 Moo. P. C. C. 61, at 72. See also *Symonds v. Atkinson*, 1 H. & N. 146.

⁸ *Rothschild v. Corney*, 9 B. & C. 388.

whether the transfer was in such circumstances as should have raised suspicion in the transferee. *London and County Banking Co. v. Groome*¹ illustrates this point. A lapse of eight days occurred between the drawing and presentment of a cheque; and this Field, J., considered "although not conclusive, a circumstance to be taken into consideration by them (the jury) in coming to a conclusion on that question," i.e., whether the transfer should have raised suspicions.

Bills of exchange are specially favoured by the law merchant when in the hands of *bond fide* holders for value without notice,² so that in the case of a bill or note lost or stolen and purchased from either finder or thief by a *bond fide* purchaser, he may hold it against the true owner, even though he took it negligently and in circumstances of suspicion. This is in derogation of what Bowen, L.J., terms "the broad principle of law," "that except in the case of a sale in market overt³ no person can acquire a title to a personal chattel from a person who is not the owner."⁴ There must be actual or constructive notice of the defective title—in other words, *mala fides*—to defeat the purchaser's title. The purchaser is not bound to look beyond the instrument.⁵ This rule was first formulated in the case of a lost bank-note,⁶ on the ground that the exigencies of business and the consideration that bank-notes pass from hand to hand so require. Later, the same principle was applied to merchants' drafts,⁷ and lastly bills and notes were also held to be comprehended by it.⁸

¹ 8 Q. B. D. 288; *Hayes v. Robertson*, 15 Vict. L. R. 480. *Bull v. Bank of Kasson*, 123 U. S. (16 Davis) 105. See also 3 Kent Com. (12th ed.) 82, *cum notis*; *London Joint Stock Company v. Simmons* (1892), App. Cas. 201, at 221.

² In *Goodman v. Harvey*, 4 A. & E. 870, where the bill bore on its face the marks of its dishonour, Denman, C.J., at 872, was of opinion the plaintiff could not recover, for he "had received the bill with a death-wound apparent on it."

³ *The Case of Market Overt*, Tudor, L. C. on Mercantile Law (3rd ed.), 274, in the notes to which, 275-307, the law as to sales in market overt is considered.

⁴ See the Larceny Act, 1861, (24 & 25 Vict. c. 96), ss. 75 and 100.

⁵ *Goodman v. Harvey*, 4 A. & E. 870; *King v. Milsom*, 2 Camp. 5. As to *onus* of proof of title to a negotiable instrument, *Solomons v. Bank of England*, 13 East 135 n. In America a distinction between bank notes and other negotiable instruments is recognized, which is not allowed in England (*De la Chaumette v. Bank of England*, 9 B. & C. 208), whereby the holder of a bank-note can rest secure in its possession as sufficient evidence of his right to recover upon it, until the defendant shews he was tainted with the fraud or at any rate cognizant of it, *Daniel, Negotiable Instruments* (4th ed.), § 1680.

⁶ *Miller v. Race*, 1 Burr. 452, 1 Sm. L. C. (9th ed.), 491.

⁷ *Grant v. Vaughan*, 3 Burr. 1516. As to the law applicable to bonds passing to bearer, see *Gorgier v. Mieville*, 3 B. & C. 45; also *Symons v. Mulken*, 30 W. R. 875; and *Crouch v. Crédit Foncier of England*, L. R. 8 Q. B. 374; and compare with what is said in the Exchequer Chamber in *Goodwin v. Roberts*, L. R. 10 Ex. 337, at 356, affirmed 1 App. Cas. 476. See also *Picker v. London and County Banking Company*, 18 Q. B. Div. 515. For the law where share certificates with a blank form of transfer are handed over, see *Colonial Bank v. Hepworth*, 36 Ch. D. 36; *Colonial Bank v. Cady and Williams*, 5 App. Cas. 267; *London Joint Stock Bank v. Simmons* (1892), App. Cas. 201, at 221; *Venables v. Baring Brothers* (1892), 3 Ch. 527. *Frey v. Ives*, 8 Times L. R. 582, is a decision on the particular facts.

⁸ *Peacock v. Rhodes*, 2 Dong. 633. In *Glyn v. Baker*, 13 East 509, the securities were not then negotiable. See now 51 Geo. III. c. 64, s. 4.

Statutory
provision.

At common law, if the holder of a bill lost it, no action by him would lie, for by the custom of merchants the acceptor was entitled to the possession of the bill as his voucher for the payment.¹ In equity, however, relief would be given and payment ordered where an offer was made to give an indemnity under the direction of the Court.² Now, by the Bills of Exchange Act, 1882,³ provision is made for forbidding the loss of such an instrument to be set up, "provided an indemnity be given to the satisfaction of a court or judge against the claims of any other person upon the instrument in question."

When present-
ment for
payment
must be made.

Presentment for payment of a bill or note we have seen must be made by the holder or his agent, at a reasonable hour, on a business day, at the proper place, to the person designated by the bill or note as the payer or his agent,⁴ if such a person can be found by the use of reasonable diligence. It may also be made through the Post Office.⁵ Presentment, if at a banker's, should be within banking hours; if not at a banker's, it may be made at any time of the day when the person chargeable may reasonably be expected to be found at his place of residence or business, though it be six, seven, or eight in the evening.⁶ When a bill or note is presented by the holder or his agent at a reasonable hour on a business day at the proper place, and after the exercise of reasonable diligence no person authorized to pay or refuse payment can be found there, no further presentment to the drawee or acceptor or maker is necessary.⁷

Personal
demand not
in general
necessary.

A personal demand is not in general necessary.⁸ If, however, a bill is drawn upon, or accepted, or a note made by two or more persons

¹ *Hansard v. Robinson*, 7 B. & C. 90. See Bayley, Bills of Exchange (6th ed.), 139.

² *Walsley v. Child*, 1 Ves. Sen. 341; Story, Eq. Jur. 85.

³ 45 & 46 Vict. c. 61, ss. 69, 70. See *Gillett v. The Bank of England*, 6 Times L. R. 9; *Conflans Stone Quarry Company, Limited, v. Parker*, L. R. 3 C. P. 1; *Bevan v. Hill*, 2 Camp. 381. At common law the holder of a bill of exchange might release the liability of the acceptor by parol, *Whatley v. Tricker*, 1 Camp. 35; but by 45 & 46 Vict. c. 61, s. 62, the bill must now be delivered up to the acceptor where the renunciation is not in writing. With respect to bank-notes, absolutely destroyed by accident, the banker, on due proof thereof, must pay the owner. If only lost by theft, &c., he must pay the *bond fide* holder; *Shaw, C.J.*, in *Whiton v. Old Colony Insurance Company*, 43 Mass. 1, at 6; 3 Kent Comm. (12th ed.), 115, *cum notis*.

⁴ A collecting agent is liable if he does not use due diligence. *Lubbock v. Tribe*, 3 M. & W. 607, at 612; *Lysaght v. Bryant*, 19 L. J. C. P. 160.

⁵ 45 & 46 Vict. c. 61, s. 45, sub-s. 3-8. As between drawer and holder the presentment for payment must be within a reasonable time, and the drawer is not discharged unless some loss is occasioned to him by the delay, *Heywood v. Pickering*, L. R. 9 Q. B. 428. In *Prideaux v. Criddle*, L. R. 4 Q. B. 455, at 461, presentment through a post office was said to be a reasonable mode of presentment. See per *Erle, C.J.*, *Bailey v. Bodenham*, 16 C. B. N. S. 288, at 296. Presentment was held to be excused in *In re Bethell*, *Bethell v. Bethell*, 34 Ch. D. 561. Cp. *Smith v. Bank of New South Wales*, L. R. 4 P. C. 194, per *Mellish, L.J.*, at 207.

⁶ *Byles*, Bills of Exchange (15th ed.) 285.

⁷ 45 & 46 Vict. c. 61, s. 45, sub-s. 5.

⁸ *Matthews v. Haydon*, 2 Esp. (N. P.) 509; *Brown v. M'Dermot*, 5 Esp. (N. P.) 265.

who are not partners, and no place of payment is specified, presentment must be made to all of them.¹ In the event of the death of the person chargeable, where no place of payment is specified on the bill, presentment must be made to his personal representative.² If a bill or note is not duly presented, all the antecedent parties are discharged,³ though the acceptor or maker continues liable.⁴ Neglect to present has been held not to discharge a man who guarantees the due payment of a bill or note.⁵ And a payment before a bill or note becomes due does not entinguish it any more than if it were merely discounted.⁶

In *Roberts v. Tucker*,⁷ the Exchequer Chamber held the acceptance of a bill of exchange payable at a banker's to be equivalent to an order to the banker to pay the bill to any person who, according to the law merchant, could give a valid discharge for it. Therefore a banker is warranted in paying to any one who becomes the holder by a genuine indorsement, and only to such; and the responsibility for deciding on the genuineness of indorsements is on the banker. The liability thus attaching to bankers is extremely onerous. Lord Herschell, indeed, going so far as to say the decision "rested upon the assumption that it was possible for a banker to do that which would be, commercially speaking, absolutely impracticable—viz., to investigate the validity of all the indorsements before he complied with the direction of his customers and paid the bill;"⁸ but as is suggested in the judgment of Parke, B.,⁹ the banker may, if he pleases, avoid it by requiring his customers "to domicile their bills at their own offices and to honour them by giving a cheque upon the banker." Failing this, they are liable if they pay on other than a genuine indorsement.¹⁰ Lord Halsbury, C., in *Bank of England v.*

Roberts v. Tucker.

Criticism of Lord Herschell.

Anticipated by Parke, B.

¹ 45 & 46 Vict. c. 61, s. 45, sub-s. 6.

² Sec. 45, sub-s. 7.

³ Sec. 45.

⁴ Sec. 52, sub-s. 1. General and qualified acceptances are distinguished, sec. 10. *Rowe v. Young*, 2 Bligh (H. L.) 391, at 467, 468. Cp. *Maltby v. Murrells*, 5 H. & N. 813, at 823.

⁵ *Carter v. White*, 25 Ch. D. 666; *Hitchcock v. Humfrey*, 5 M. & G. 559; *Walton v. Mascall*, 13 M. & W. 452; see *Ex parte Bishop*, *In re Fox*, 15 Ch. D. 400.

⁶ *Burbridge v. Manners*, 3 Camp. 193, at 195; *Scholey v. Ramsbottom*, 2 Camp. 485.

⁷ 16 Q. B. 560. See *Woods v. Thiedemann*, 1 H. & C. 478. The distinction between *Roberts v. Tucker*, and *Bank of England v. Vagliano Brothers*, (1891) App. Cas. 107, is that in *Roberts v. Tucker* the acceptor did not contribute to mislead the bankers, and when there is a *bond fide* payee, the acceptor remains liable to him. But where there is a real payee, as in *Bank of England v. Vagliano Brothers*, and the drawer indorses the name of a pretended payee, there is no outstanding liability from which a discharge is needed for the acceptor's protection. *Roberts v. Tucker*, in the main, has now statutory sanction by virtue of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 24; though, as is pointed out presently, the application of the decision to cheques is disallowed by the same authority. *Post*, 1560.

⁸ *Bank of England v. Vagliano Brothers*, (1891) App. Cas. at 155.

⁹ 16 Q. B. at 579.

¹⁰ From this statement Lord Macnaghten draws the conclusion that the relation

Vagliano Brothers,¹ was not "prepared to assent to the proposition that it (*i.e.*, the decision in *Roberts v. Tucker*) is a harsh decision. A customer tells his banker to pay a particular person; the banker pays some one else, and it would seem to follow as a perfectly just result that the banker should be called upon to make good the amount he has so erroneously paid."

Law declared
in *Roberts v.*
Tucker
modified by
statute.

The law as laid down in *Roberts v. Tucker* was shortly afterwards modified by statute,² and the alteration thus effected was continued in the Bills of Exchange Act, 1882;³ so that, when a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsements are genuine; and he is protected if the indorsements are forged.⁴ *Roberts v. Tucker* remains law in cases not within the terms of this enactment.

Notice of
dishonour.

Notice of dishonour must be given by the holder of a bill to the drawers and indorsers, or to their authorized agent, to entitle the holder to a suit against them. This must be done with reasonable diligence; and it seems now settled that each person successively into whose hands a dishonoured bill passes is allowed one entire day for the purpose of giving notice. The rules applicable are, however, set out with some particularity in the Bills of Exchange Act, 1882.⁵

Acceptance
admits
drawer's
signature but
not indorser's.

It may here be further noted that though an acceptance of a bill admits the drawer's signature, it does not as a rule admit the genuineness of an indorsement, even though the indorsement were on the bill before acceptance. This was always the law.⁶ Since

of banker and customer does not of itself, and apart from other circumstances, impose upon a banker the duty of paying his customer's acceptances, *Bank of England v. Vagliano Brothers*, (1891) App. Cas. at 157. Vagliano's case is considered and distinguished in *Shipman v. Bank of State of New York*, 126 N. Y. 318, 22 Am. St. R. 821. There it is said, (126 N. Y. at 335), per O'Brien, J., delivering the opinion of the Court: "Our statute is a codification of the Common Law, while the English statute is, and was intended to be, a departure from it. In so far as the opinions deal with the facts of the case upon the question of negligence, it is difficult to deduce from them any abstract rule or principle." This last assertion is in close accord with what is said by Lord Bramwell in delivering his opinion in Vagliano's case, (1891) App. Cas. at 143.

¹ (1891) App. Cas. 107, at 117. See per Lord Esher when giving judgment in the same case in the Court of Appeal, 23 Q. B. Div. 243, at 254; and, as supporting the view of the Lord Chancellor, Lord Bramwell and Lord Macnaghten, (1891) App. Cas. at 141 and 158 respectively.

² 16 & 17 Vict. c. 59, s. 19.

³ 45 & 46 Vict. c. 61, s. 60. See *Guardians of Halifax Union v. Wheelwright*, L. R. 10 Ex. 183.

⁴ "I am inclined to think that sec. 8 [of 45 & 46 Vict. c. 61] divides bills into three classes—bills not negotiable, bills payable to order, and bills payable to bearer; so that a bill payable to order must always be negotiable:" per Fry, L.J., *National Bank v. Silke* (1891), 1 Q. B. 435, at 439.

⁵ 46 & 47 Vict. c. 61, sec. 49. The subject is treated with considerable minuteness and with reference to the cases, 3 Kent, Comm. (13th edit.) 104-111, *cum notis*.

⁶ *Smith v. Chester*, 1 T. R. 654; *Carvick v. Vickery*, 2 Doug. 653; *Cooper v. Meyer*, 10 B. & C. 468. Daniel, *Negotiable Instruments* (4th ed.), §§ 532-540, lays down that (a) an acceptance admits: (1) the signature of the drawers; (2) funds of

the Bills of Exchange Act, 1882, the point is dealt with by statutory authority.¹

Though the duty of the banker is, *prima facie*, only to pay to the order of the person named as payee on the bill or under the limitations marked out by the Bills of Exchange Act, 1882,² yet as between banker and customer there may be circumstances that rebut this *prima facie* case. This is pointed out by Lord Selborne in *Bank of England v. Vagliano Brothers*.³ "Negligence on the customer's part," says he, "might be one of those circumstances; the fact that there was no real payee might be another; and I think that a representation made directly to the banker upon a material point, untrue in fact (though believed by the person who made it to be true), and on which the banker acted by paying money which he would not otherwise have paid, ought also to be an answer to that *prima facie* case. If the bank acted upon such a representation in good faith, and according to the ordinary course of business, and a loss has in consequence occurred which would not have happened if the representation had been true, I think that is a loss which the customer, and not the bank, ought to bear."

When a banker receives bills to present for payment it is not negligent of him to deliver the bills to the acceptor on receipt of a cheque for the amount of the bills. In a case in which the contention was raised, that the acceptance of a cheque in such circumstances was negligence, the Court of King's Bench said emphatically: "We dare not even grant a rule to show cause, as it would be putting the whole trade of London in suspense, pending it."

It is not a good ground of defence against a *bond fide* holder for value that he was informed that the note was made or the bill accepted in consideration of an executory contract, unless he was also informed of its breach;⁴ though it is that the holder had constructive knowledge or the means of knowing of a defect in title and abstained from inquiry to avoid actual notice. "I agree," says Parke, B.,⁵ "that 'notice and knowledge' means not merely express notice, but knowledge or the means of knowledge to which the party wilfully shuts his eyes."⁶

drawer in drawee's hands; (3) drawer's capacity to draw; (4) payee's capacity to indorse; (5) agent's handwriting and authority, where there is an agent. (b) An acceptance does not admit: (1) signature of payee; (2) agency to endorse; (3) genuineness of terms in the body of the bill. See *Scholfield v. Earl of Londesborough* (1894), 2 Q. B. 660, affirmed (1895), 1 Q. B. 536. Cp. with this *Greenfield Savings Bank v. Stowell*, 123 Mass. 196; also *post*, 1580.

¹ 45 & 46 Vict. c. 61, s. 54.

² 45 & 46 Vict. c. 61; and see *Edinburgh Ballarat Gold Quartz Mine Company, Limited, v. Sydney*, 7 Times L. R. 656.

³ (1891) App. Cas. 107, at 123.

⁴ *Russell v. Hankey*, 6 T. R. 12.

⁵ The cases are collected in Daniel, *Negotiable Instruments* (4th ed.), § 790.

⁶ *May v. Chapman*, 16 M. & W. 355, at 361. See Daniel, *Negotiable Instruments* (4th ed.), § 796.

⁷ As to that negligence which carries the consequences of fraud, see *post*, 1624.

American
decision.

In an American case, *Siegel, Cooper & Co. v. Chicago, &c., Bank*,¹ it was further held that the mere fact that the consideration for which a note is given is recited in it, although it may appear thereby that it was given for or in consideration of an executory contract or promise on the part of the payee will not destroy its negotiability, unless it appears, through the recital, that it qualifies the promise to pay, and renders it conditional or uncertain either as to the time of payment or the sum to be paid; but "if at the time of the indorsement the consideration has in fact failed, the recital might be sufficient to put him (the holder) on inquiry, and in connection with other facts amount to notice."²

Innocent
holders of
forged
instruments.
Price v. Neal.

The law as to the liabilities of innocent holders of forged instruments is treated in *Price v. Neal*.³

Opinion of
Lord
Mansfield.

A bill was indorsed to the defendant for valuable consideration, and notice was left at plaintiff's house on the day the bill became due. Plaintiff sent his servant to take it up. Another bill was then drawn which the plaintiff accepted, and which was also indorsed to the defendant for valuable consideration, left at his bankers, paid by order of the plaintiff, and taken up. Both these bills were forged by one Lee who was subsequently to payment, and before action brought, hanged for forgery. Defendant was found to have acted innocently and *bond fide* without the least privity or suspicion of the forgeries, and to have paid the whole value of the bills. On motion after verdict for the plaintiff, Lord Mansfield⁴ said: In an action for money had and received, "the plaintiff cannot recover the money unless it is against conscience in the defendant to retain it; and great liberality is always allowed in this sort of action."⁵ But it can never be thought unconscientious in the defendant, to retain this money when he has once received it upon a bill of exchange indorsed to him for a fair and valuable consideration, which he has *bond fide* paid without the least privity or suspicion of any forgery." "It is a misfortune which has happened without the defendant's fault or neglect. If there was no

¹ 19 Am. St. R. 51.

² *L. c.* at 53. In connection with the subject of bills may be noted what Parke, B., says in *Foster v. Pearson*, 1 Cr. M. & R. 849, at 858, as to a bill-broker. He "is not a character known to the law with certain prescribed duties; but his employment is one which depends entirely upon the course of dealing. It may differ in different parts of the country, it may have powers more or less extensive in one place than in another; what is the nature of its powers and duties in any instance is a question of fact, and is to be determined by the usage and course of dealing in the particular place."

³ (1762) 3 Burr. 1354.

⁴ *L. c.* at 1357.

⁵ See per Lord Mansfield, *Moses v. Macferlan*, 2 Burr. 1005, at 1010. When plaintiff's money has been wrongfully obtained by the defendant, the plaintiff may waive the wrong, and claim as money received to his use: *Hambly v. Trott*, 1 Cowp. 371, at 376; *Linden v. Hooper*, 1 Cowp. 414, at 419. *Ante*, 886. Money feloniously stolen constitutes a debt from the felon: *Chowne v. Baylis*, 8 Jur. N. S. 1028; so also money obtained under a fraudulent contract, *Street v. Blay*, 2 B. & Ad. 456.

neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man; but in this case, if there was any fault or negligence in any one, it certainly was in the plaintiff and not in the defendant."

This case may also be explained on the ground taken by Lord Kenyon, C.J., in *Barber v. Gingell*,¹ where the defendant having proved a plea of forgery to a declaration on a bill of exchange, the Chief Justice ruled that it was a good answer for the plaintiff to show that the defendant had paid other bills of the same party under similar circumstances; "for though the defendant might not have accepted the bill, he had adopted the acceptance and made himself thereby liable to the payment of it."²

Explained by
Lord Kenyon
in *Barber v.*
Gingell.

Price v. Neal was considered "very distinguishable" in *Jones v. Ryde*,³ where it was held that a person who discounts a forged Navy bill for another who passed it to him without knowledge of the forgery, may recover back what he has paid as money had and received to his use upon failure of the consideration. "If a person gives a forged bank-note there is nothing for the money; it is no payment."⁴ The distinction between *Jones v. Ryde* and *Price v. Neal* is, that in the former case the parties did not pay money upon contracts supposed to be their own and which they were bound to know, but they received in discharge of another's contract something which purported to be of value yet was worth nothing.⁵

Price v. Neal,
distinguished
in *Jones v.*
Ryde.

*Bruce v. Bruce*⁶ is the case of the forgery of a victualling bill, which the victualling office on whom it was drawn had paid before the forgery was discovered; the decision is on the lines of *Jones v. Ryde*, that as the victualling office was a public body, and not so likely to know the signature of their officers as a merchant is to know his own signature or the signatures of those authorized by him, the payment was without consideration.⁷

Bruce v.
Bruce.

¹ (1800) 3 Esp. (N. P.) 60.

² See *Leach v. Buchanan*, 4 Esp. (N. P.) 226, where defendant accredited a forged bill, and thereby induced plaintiff to take it; also *Mather v. Lord Maidstone*, 18 C. B. 273, 1 C. B. N. S. 273; *De Feriet v. Bank of America*, 23 La. Ann. 310.

³ 5 Taunt. 488, at 492. Cp. *Gompertz v. Bartlett*, 2 E. & B. 849; *Gurney v. Womersley*, 4 E. & B. 133; see also *Wilkinson v. Johnston*, 3 B. & C. 428, money paid in discharge of a forged bill; *Burchfield v. Moore*, 3 E. & B. 683, money given for a bill of exchange avoided by a material alteration; *Young v. Cole*, 3 Bing. N. C. 724, money given for bonds sold as valid, but proved worthless; *Turner v. Stones*, 1 Dow. & L. 122; and *Woodland v. Fear*, 7 E. & B. 519, money given for a forged bank-note or worthless cheque.

⁴ Per Heath, J., 5 Taunt. at 494.

⁵ Cp. *Lamert v. Heath*, 15 M. & W. 486; *Lawes v. Purser*, 6 E. & B. 930.

⁶ 5 Taunt. 495 n.

⁷ *Gloucester Bank v. Salem Bank*, 17 Mass. 33; *First National Bank of Danvers v. First National Bank of Salem*, 151 Mass. 280, 21 Am. St. R. 450. Failure of consideration must be complete in order to entitle plaintiff to recover the money paid: *Hunt v. Silk*, 5 East 449; *Blackburn v. Smith*, 2 Ex. 783. Where the consideration is severable a proportionate part may be recovered: *Hirst v. Tolson*, 19 L. J. Ch. 441; *Devaux v. Conolly*, 8 C. B. 640.

Price v. Neal,
followed in
Smith v.
Mercer.

The majority of the Common Pleas (Chambre, J., dissenting) in *Smith v. Mercer*,¹ held that an intelligible rule was furnished by Price and Neal, where *Jenys v. Fawler*² is cited as holding that "proof of forgery shall not be admitted on behalf of the acceptor of a bill because it would hurt the negotiation of paper credit."³ In *Smith v. Mercer*¹ bankers paid a bill presented to them, which proved a forgery, and which was repudiated by their customer on whose account it purported to be paid. They then sued the defendants in assumpsit for money had and received; in which action they failed on the ground that a banker's duty to know the handwriting of his customer is even a more stringent duty than that of an acceptor to know the drawer's handwriting. These cases are canvassed in *Wilkinson v. Johnston*,⁴ and in *Cocks v. Masterman*.⁵

Rule stated in
Cocks v.
Masterman.

In *Cocks v. Masterman* the rule is stated, "that the holder of a bill is entitled to know, on the day when it becomes due, whether it is an honoured or dishonoured bill, and that, if he receive the money and is suffered to retain it during the whole of that day, the parties who paid it cannot recover it back."⁶

Adopted in
Cooke v. United
States.

This rule is substantially adopted in the United States, as appears from *Cooke v. United States*,⁷ where a bank was paid in notes purporting to be their own. The Court adopted⁸ the language of Parker, J., in *Gloucester Bank v. Salem Bank*,⁹ held that "the party receiving such notes must examine them as soon as he has opportunity, and return them immediately; if he does not, he is negligent; and negligence will defeat his right of action." Fuller, C.J., thus expressed the opinion of the Court: "It is undoubtedly also true, as a general rule of commercial law, that where one accepts forged paper purporting to be his own, and pays it to a holder for value, he cannot recall the payment. The operative fact in this rule is the acceptance, or more properly perhaps the adoption, of the paper as genuine by its apparent maker. Often the bare receipt of the paper accompanied by payment is equivalent to an adoption within the meaning of the rule;

Judgment of
Fuller, C.J.

¹ (1815) 6 Taunt. 76. See 3 Kent Comm. 86.

² 2 Str. 946.

³ 1 Wm. Bl. 390, at 391.

⁴ 9 B. & C. 902.

⁵ 3 B. & C. 428.

⁶ Per Bayley, J., *l. c.* at 908.

⁷ 91 U. S. (1 Otto), 389. While dealing with this case it may be worth while to notice another point treated by Fuller, J., in his judgment. "Laches," he says at 398, "is not imputable to the government in its character as sovereign by those subject to its dominion. Still a government may suffer loss through the negligence of its officers. If it comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there. Thus if it becomes the holder of a bill of exchange, it must use the same diligence to charge the drawers and indorsers that is required of individuals; and if it fails in this, its claim upon the parties is lost." As to laches, see *ante*, 1511.

⁸ 91 U. S. (1 Otto), at 397.

⁹ 17 Mass. 33.

because as every man is presumed to know his own signature and ought to detect its forgery by simple inspection, the examination which he can give when the demand upon him is made is all that the law considers necessary for his protection. He must repudiate as soon as he ought to have discovered the forgery, otherwise he will be regarded as accepting the paper. Unnecessary delay under such circumstances is unreasonable; and unreasonable delay is negligence, which throws the burden of the loss upon him who is guilty of it, rather than upon one who is not."

The point has been elaborately discussed, whether the acceptor, being estopped from denying the signature of the drawer, is not also estopped from denying the drawer's signature as indorser. On the one hand, dicta have been cited of Lord Tenterden in *Cooper v. Meyer*;¹ of Wightman, J., in *Ashpitel v. Bryan*;² and of Patteson, J., in *Tucker v. Roberts*.³ On the other hand, it has been well pointed out that the meaning of the acceptor's vouching for the drawer is not "for the name being written by the drawer's own hand, but for the drawing being, so far as he is concerned, valid and indisputable."⁴ The acceptor would therefore be at liberty to rebut a presumption that the indorsing was in the same handwriting.⁵

In England the law is now settled in harmony with the view of the Canadian Courts, as stated above, by the Bills of Exchange Act, 1882, sec. 24.⁶

In America, Taney, C.J., states the law as follows:⁷ "The general rule undoubtedly is, that the drawee by accepting admits the handwriting of the drawer; but not of the indorser. And the holder is bound to know that the previous indorsements, including that of the payee, are in the handwriting of the parties whose names appear upon the bill, or were duly authorised by them. And if it should appear that one of them is forged, he cannot recover against the acceptor, although the forged name may be on the bill at the time of the acceptance. And if he has received the money from the acceptor, and the forgery is afterwards discovered, he will be compelled to repay it. The reason of the rule is obvious. A forged indorsement cannot transfer any interest in the bill, and the holder therefore has no right to demand the money. If the bill is dishonoured by the drawee, the drawer is not re-

Acceptor is not estopped from denying the drawer's signature as indorser.

English law settled by Bills of Exchange Act, 1882.

Taney, C.J., in *Hortman v. Henshaw*.

¹ 10 B. & C. 468, at 471.

² 3 B. & S. 474, at 489.

³ 18 L. J. Q. B. 169, at 173.

⁴ Per Patterson, J.A., *Ryan v. Bank of Montreal*, 14 Ont. App. 533, at 556.

⁵ *Merchants' Bank v. Lucas*, 15 Ont. App. 573, affd. 18 Can. S. C. R. 704. Patterson, J.A.'s, judgment in *Ryan v. Bank of Montreal*, 14 Ont. App. 533, at 546-561, is a complete treatise on the law on this question.

⁶ 45 & 46 Vict. c. 61. See *Garland v. Jacomb*, L. R. 8 Ex. 216.

⁷ *Hortman v. Henshaw*, 11 How. (U. S.), 177.

sponsible. And if the drawee pays it to a person not authorised to receive the money, he cannot claim credit for it in his account with the drawer." . . . "We take the rule¹ to be this. Whenever the drawer is liable to the holder, the acceptor is entitled to a credit if he pay the money; and he is bound to pay upon his acceptance, when the payment will entitle him to a credit in his account with the drawer."²

Bills of exchange drawn in conjunction with bills of lading.

There is another class of cases where bills of exchange have been drawn in conjunction with bills of lading, and the bills of lading having proved to be forged, the acceptor of the bills of exchange has disputed his liability on them against an indorsee.

Opinion of Tindall, C.J., in *Robinson v. Reynolds*.

In a case of this kind which went to the Exchequer Chamber, Tindall, C.J., said:³ "If the bill had been accepted without any value at all being given by the bank to the defendants," "the defendants would still be liable as acceptors to the bank, who are indorsees for value, unless, not only such want of consideration existed between the drawer and acceptors, but unless the indorsees had notice or knowledge thereof. For the acceptance binds the defendants conclusively, as between them and every *bona fide* indorsee for value."

Hoffman v. Bank of Milwaukee.

The American cases follow in the same course. In *Hoffman v. Bank of Milwaukee*,⁴ a consignor who had been in the habit of drawing bills of exchange on his consignee with bills of lading attached, drew in ordinary course; but the bills of lading were forged. The bills were discounted in the ordinary way by a bank ignorant of the fraud; the consignee, ignorant of the forgery, paid the draft, and was held to have no recourse against the bank. "Money," said Clifford, J.,⁵ "paid under a mistake of facts, it is said, may be recovered back as having been paid without consideration, but the decisive answer to that suggestion, as applied to the case before the Court, is, that money paid, as in this case, by the acceptor of a bill of exchange to the payee of the same, or to a subsequent indorsee, in discharge of his legal obligation as such, is not a payment by mistake nor without consideration, unless it be shown that the instrument was fraudulent in its inception, or that the consideration was illegal, or that the facts and circumstances which impeach the transaction, as between the acceptor and the drawer, were known to the payee or subsequent indorsee at the

Judgment of Clifford, J.

¹ *L. c.* at 184.

² For the cases on money paid under a mistake of fact, *Marriot v. Hampton*, 2 Sm. L. C. (9th ed.), 441; *Moore v. Vestry of Fulham* (1895), 1 Q. B. 399.

³ *Robinson v. Reynolds*, 2 Q. B. 196, at 211; *Thiedemann v. Goldschmidt*, 1 De G. F. & J. 4.

⁴ 12 Wall. (U. S.), 181.

⁵ *L. c.* at 189.

time he became the holder of the instrument." "It is not pretended that the defendants had any knowledge or intimation that the bills of lading were not genuine, nor is it pretended that they made any representation upon the subject to induce the plaintiffs to contract any such liability. They received the bills of exchange in the usual course of their business as a bank of discount, and paid the full amount of the net proceeds of the same to the drawers, and it is not even suggested that any act of the defendants, except the indorsement of the bills of exchange in the usual course of their business operated to the prejudice of the plaintiffs or prevented them from making an earlier discovery of the true character of the transaction." "Beyond doubt the bills of lading gave some credit to the bills of exchange beyond what was created by the pecuniary standing of the parties to the same, but it is clear that they are not a part of those instruments, nor are they referred to either in the body of the bills or in the acceptance, and they cannot be regarded in any more favourable light for the plaintiffs than as collateral security accompanying the bills of exchange. Sent forward, as the bills of lading were, with the bills of exchange, it is beyond question that the property in the same passed to the acceptors when they paid the several amounts therein specified." "Proof, therefore, that the bills of lading were forgeries could not operate to discharge the liability of the plaintiffs, as acceptors, to pay the amounts to the payees or their indorsees, as the payees were innocent holders, having paid value for the same in the usual course of business. Different rules apply between the immediate parties to a bill of exchange—as between the drawer and the acceptor, or between the payee and the drawer—as the only consideration as between those parties is that which moves from the plaintiff to the defendant; and the rule is, if that consideration fails, proof of that fact is a good defence to the action. But the rule is otherwise between the remote parties to the bill, as for example, between the payee and the acceptor, or between the indorsee and the acceptor, as two distinct considerations come in question in every such case where the payee or indorsee became the holder of the bill before it was overdue, and without any knowledge of the facts and circumstances which impeach the title as between the immediate parties to the instrument. Those two considerations are as follows: First, that which the defendant received for his liability; and secondly, that which the plaintiff gave for his title. And the rule is well settled that the action between the remote parties to the bill will not be defeated unless there be an absence or failure of both these considerations."¹

Bills of lading only collateral security for bills of exchange.

Proof of the actual consideration may be given between the immediate parties to bills of exchange.

Rule otherwise between remote parties.

¹ See also *Goetz v. Bank of Kansas City*, 119 U. S. (12 Davis), 551. As to how

No ratification
of a forged
instrument.

It is clear, both on principle and authority, that there can be no ratification of a forged instrument, for an essential element of ratification is wanting, viz., that the act ratified is one assumed or pretended to have been done for or under the authority of the party sought to be charged. *Williams v. Bayley*,¹ implies this. The actual point is decided in *Brook v. Hook*.²

Blackburn, J.,
in *McKenzie v. British
Linen Co.*

In *McKenzie v. British Linen Co.*,³ Blackburn, J., speaks of a forgery as possibly an act done by a person as professing to be agent, and in such case the subject of ratification. Such a profession, if not absolutely impossible to be made, can very rarely be made in the case of forgery, where the profession is not that the signature is an authorised signature, but that it is the very signature of him whose name is used.

The law in England is fixed in the sense of the majority of the court in *Brook v. Hook* by the Bills of Exchange Act, 1882.⁴

CHEQUES.⁵

Definition.

A cheque is defined in the Bills of Exchange Act,⁶ 1882, as "a bill of exchange drawn on a banker, payable on demand.

negotiable instruments may be affected by fraud, see note to *Bedell v. Herring*, 11 Am. St. R. 307, 309-326. What is carelessness in signing. As to concealed fraud and the Statute of Limitations, *Gibbs v. Guild*, 8 Q. B. D. 296, 9 Q. B. Div. 59. As to the meaning of a bill of exchange being a negotiable instrument and the incidents attaching thereto, *Collins v. Martin*, 1 B. & P. 648. An alteration of the date of a bill of exchange avoids the instrument, *Master v. Miller*, 4 T. R. 320, in error, 2 H. Bl. 140. This is subject to the modification introduced by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 64, sub-s. (1), excepting a party who has himself made, authorized, or assented to the alteration and subsequent indorsers; and also the case where "the alteration is not apparent and the bill is in the hands of a holder in due course such holder may avail himself of the bill as if it had not been altered." In America the law is in the main the same, *Fordyce v. Kosminski*, 4 Am. St. R. 18. The limitation is, however, insisted on that the term alteration "is understood to signify a material change in the contract by a party thereto, and no spoliation will avoid a bill or note (being the act of a stranger), unless it be so great as to render the words unintelligible or uncertain, in which case it is regarded as a virtual destruction of it": *Daniel, Negotiable Instruments* (4th ed.), § 1373 a. See *United States v. Spalding*, 2 Mason (U. S.), 478, a case where mutilation of an instrument was occasioned by fraud. As to alterations in deeds at Common Law, *Pigot's Case*, 11 Co. Rep. 26 b. The rules of law applicable to deeds were held applicable also to documents not under seal in *Master v. Miller* (*supra*); *Henfree v. Bromley*, 6 East, 309. See *Cowie v. Halsall*, 4 B. & Ald. 197. What is a "material alteration" was the subject of decision in *Suffell v. The Bank of England*, 9 Q. B. D. 555; *Leeds and County Bank Limited v. Walker*, 11 Q. B. D. 84; *Knill v. Williams*, 10 East, 431. *Cp. London and Provincial Bank of England v. Roberts*, 22 W. R. 402. *Gordon v. Third National Bank*, 144 U. S. (37 Davis), 97, considers what is a material alteration in a promissory note. When a note is fraudulently altered, not only is its legal identity destroyed, but the debt for which it was executed is also extinguished: *Warder etc. Co. v. Willyard*, 24 Am. St. R. 250, save as above provided, *Scholfield v. Earl of Lonsborough* (1895), 1 Q. B. 536. A note to *Draper v. Wood*, 17 Am. R. 92, at 97, 106, collects the cases on the alteration of negotiable instruments.

¹ L. R. 1 H. L. 200.

² L. R. 6 Ex. 89; *Martin, B.*, dissented.

³ 6 App. Cas. 82, at 100.

⁴ 45 & 46 Vict. c. 61, s. 24. In America "the weight of authority is the other way." See Mr. Holmes's note *Ratification*, 2 Kent Comm. (12th ed.) 616.

⁵ 45 & 46 Vict. c. 61, ss. 73-82; *M'Lean v. Clydesdale Banking Company*, 9 App. Cas. 95; *National Bank v. Silke* (1891), 1 Q. B. 435.

⁶ 45 & 46 Vict. c. 61 s. 73. The relations of banker and customer in respect of cheques are summarized, *Chalmers, Bills of Exchange*, note to s. 75.

A cheque has been described as the instrument by which, customarily, a depositor seeks to withdraw his funds or any part thereof from the bank. It is a draft or order on the banker requiring him to pay a sum named either to bearer, or to a named person, or to the order of the payee.¹ It is clearly not an assignment of money in the hands of a banker; it is a bill of exchange payable at a banker's.²

There is a distinction between cheques and bills as to the consequences of delay or neglect in presenting them for payment. In the case of a bill of exchange, negligence in presenting or in giving notice absolutely discharges the drawer. In the case of a cheque the drawer is the principal debtor, and the cheque purports to be drawn upon a fund deposited to meet it. In the absence, then, of any loss or injury sustained by any negligence in not making due presentment or not giving notice of dishonour, the drawer of a cheque is not discharged; and, if he has sustained loss or injury, he is then only discharged to the extent of such loss or injury.³

When a cheque is presented at the banker's upon whom it is drawn, it is presented for payment,⁴ but if the holder accepts something else from the banker in substitution for payment, he does so at his peril and discharges the drawer. For example, the drawer of a cheque was held discharged where the payee took it to the bank on which it was drawn on the afternoon of the day on which he received it from the drawer, and got it marked "good," the amount being charged to the drawer's account, but the payee did not demand payment and took the cheque away with him. On the evening of the same day the banker suspended payment, and

Distinction in the consequences of presentation for payment of bills of exchange and cheques respectively.

Cheque when presented is presented for payment.

¹ Morse, *Banks and Banking* (2nd ed.), 249. See the exhaustive notes by Mr. Holmes on *Cheques*, 3 Kent Comm. (12th ed.), 88, and on *Notice*, 3 Kent Comm. (12th ed.), 105.

² *Hopkinson v. Forster*, L. R. 19 Eq. 74. In *First National Bank v. Whitman*, 94 U. S. (4 Otto) 343, it was argued that the payee of a cheque, whose indorsement had been forged or made without authority, and which cheque had been paid by the bank upon which it was drawn, could maintain a suit against the bank to recover the amount of the cheque. The opinion of the Court was adverse to this contention. "We think it clear," said Hunt, J., at 344, "both upon principle and authority, that the payee of a cheque unaccepted cannot maintain an action upon it against the bank on which it is drawn. The careful and well-reasoned opinion of Mr. Justice Davis in delivering the judgment of the Court in *Bank of the Republic v. Millard* (10 Wall. (U. S.) 152), leaves little to add upon the subject by way of illustration or authority." "It is not to be doubted, however, that it is within the power of the bank to render itself liable to the holder and payee of the cheque. This it may do by a formal acceptance written upon the cheque, in which case it stands to the holder in the position of a drawer and acceptor of a bill of exchange." "It may accomplish the same result by writing upon it the word 'good,' or any similar words which indicate a statement by it that the drawer has funds in a bank applicable to the payment of the cheque, and that it will so apply them."

³ *Robinson v. Hawksford*, 9 Q. B. 52; *In re Bethell*, *Bethell v. Bethell*, 44 Ch. D. 561.

⁴ A cheque should be presented for payment not later than the day following that on which the holder receives it, whether the presentment is made by himself or through his bankers, expressly or by implication. This time, however, may be extended: *Alexander v. Burchfield*, 7 M. & G. 1061; *O'Brien v. Smith*, 1 Black (U. S.), 99.

the following day on presentation the cheque was refused.¹ The ground of this is well put in a New York case:² "The theory of the law is that where a cheque is certified to be good by a bank, the amount thereof is then charged to the account of the drawer in the bank certificate account." "The money is due, and payable when the cheque is certified. The bank virtually says: 'That cheque is good; we have the money of the drawer here ready to pay it. We will pay it now, if you will receive it.' The holder says: 'No, I will not take the money; you may certify the cheque and retain the money for me till this cheque is presented.'"³

Banker cashing cheque does not necessarily assume the risk of there being funds to meet it.

A banker cashing a cheque for a customer does not by doing so necessarily assume the risk of there being funds to meet it;⁴ or, to state the proposition more broadly, but with equal correctness, if a person obtains in good faith change for a cheque which turns out worthless the loss must fall on him on the ground of mistake of fact.⁵

Distinction as to time of presentment: (i.) as against the original drawer; (ii.) as against the ultimate holder.

Where a cheque is circulated, a distinction is drawn⁶ between the time of presentment necessary as against the original drawer in the event of the banker's insolvency, and the time necessary to charge the person from whom the cheque was ultimately received. The circulation should not increase the liability of the drawer; so that to charge him in the event of the banker's failure, the cheque should be presented within the period within which the payee or first holder must have presented it. As against the party transferring the cheque to the holder, it must be forwarded for presentation on the day next after the transfer.

Demand of payment of cheque by holder against drawer good at any time before action.

Though, as between holder and indorser, a cheque must be presented with due diligence,⁷ or else the holder will lose his right of resort against him, as between the holder and drawer, a demand at any time before action brought will be sufficient; unless it appear that the default of the holder has caused injury to the drawer, as

¹ *Boyd v. Nasmith*, 17 Ont. R. 40.

² *First National Bank of Jersey City v. Leach*, 52 N. Y. 350, at 353. As to the liability of a banker who certifies a cheque, and the signification and effect of certifying, *Espy v. Bank of Cincinnati*, 18 Wall. (U. S.) 604. See further, Daniel, *Negotiable Instruments* (4th ed.), § 1601; by certifying a cheque (1) the banker becomes the only debtor; (2) the holder by taking the certificate discharges the drawer; (3) the cheque circulates as the representative of so much cash in the banker's hands. See also *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 604, at 647; *Metropolitan National Bank v. Jones*, 31 Am. St. R. 403.

³ As to the practice of marking cheques received after four o'clock, *Robson v. Bennett*, 2 Taunt. 388. Cp. *Rickford v. Ridge*, 2 Camp. 537.

⁴ 45 & 46 Vict. c. 61, s. 58 sub-s. (2). *Woodland v. Fear*, 7 E. & B. 519. See judgment of Sir Montague Smith, *Prince v. Oriental Bank Corporation*, 3 App. Cas. 325.

⁵ *Timmins v. Gibbins*, 18 Q. B. 722; there is, however, a warranty by transfer to his immediate transferee for value, 45 & 46 Vict. c. 61, s. 58 sub-s. (3). Where a banker paid a customer's cheque to bearer in ignorance of the fact that at the time he had no assets of the customer, he was held not entitled to recover the money back, *Chambers v. Miller*, 13 C. B. N. S. 125.

⁶ Byles, *Bills of Exchange* (15th ed.), 22.

⁷ As to which see the authorities, collected in 3 Kent Comm. 88.

through the failure of the drawee or otherwise, when the delay will operate as an estoppel.¹

The holder of a cheque may either be a customer of the same bank as the drawer, or of another. A question has accordingly been raised whether there is not a difference in the character in which a banker receives a cheque where both drawer and holder are customers and where he has merely to collect the cheque.²

The position of a banker receiving cheques to collect considered.

The English law is settled by *Boyd v. Emmerson*,³ that if the banker receive the cheque as the holder's agent, he stands in the same position as any other agent, and is only bound to use due diligence in getting the cheque paid. If he receive it as the drawer's agent, then the person presenting it, on asking whether it were to be paid or not, would have a right to an immediate answer. If the holder merely asks for the cheque to be put to his account, the inference is that the cheque is paid in to the holder's agent subject to its being honoured or not in the course of the day.⁴

Boyd v. Emmerson.

When the bankers of the holder and the drawer are different, the deposit of a cheque for which credit is given on the depositor's account is held to be merely for collection, and the memorandum of credit may be cancelled if the collection is not accomplished in due course.⁵ The time allotted for collection is till the close of banking hours on the business day next following that on which the bank comes into possession of the cheque.⁶ The duty of the banker to his customer bears no necessary relation to the duty of the customer to others interested in the bill;⁷ and if the banker acts in other than the usual way, unless on special instructions, and loss occurs, he will be liable;⁸ and where the collecting banker and the drawee banker are in the same place, and the collecting banker has recourse to the agency of others, he will be liable for all the consequences that ensue if he has not a distinct permission to act in this manner.⁹

When bankers of the holder and drawer are different.

¹ *London and County Banking Company v. Groome*, 8 Q. B. D. 288, at 293; 3 Kent Comm. 104 n. (c).

² *Oddie v. National City Bank*, 45 N. Y. 735, where *Boyd v. Emmerson* is distinguished at 740, on the ground that there nothing was done indicating an intention or assent to receive the cheque on deposit. *Peterson v. Union National Bank*, 52 Pa. St. 206. When a customer pays a cheque into his bankers with the intention that his bankers shall at once credit him with the amount in his account, and the bankers accept the cheque upon those terms and place the amount to his credit, the bankers thereupon become holders of the cheque for value: *In re Palmer, Ex parte Richdale*, 19 Ch. Div. 409; *Royal Bank of Scotland v. Tottenham* (1894), 2 Q. B. 715, where *Gatty v. Fry*, 2 Ex. D. 265, is followed, which upholds the validity of a post-dated cheque. As to who is a customer within 45 & 46 Vict. c. 61, s. 82, see *Matthews v. Brown*, 10 Times L. R. 386.

³ 2 A. & E. 184.
⁴ *Kilsby v. Williams*, 5 B. & Ald. 815; see *Bolton v. Richard*, 6 T. R. 139.

⁵ *Moule v. Brown*, 4 Bing. N. C. 266.

⁶ *Boddington v. Schlencker*, 4 B. & Ad. 752.

⁷ *Rickford v. Ridge*, 2 Camp. 537.

⁸ *Boddington v. Schlencker*, 4 B. & Ad. 752.

⁹ *Moule v. Brown*, 4 Bing. N. C. 266; *Morse, Banks and Banking* (2nd ed.), 293.

Duty of holder of a cheque.

The holder of a cheque is not bound to give notice of its dishonour to the drawer for the purpose of charging the person from whom he received it. He does enough if he presents it with due diligence to the banker on whom it is drawn, and gives due notice of dishonour to those only against whom he seeks his remedy.¹

Besides the liability of the banker who collects cheques paid in to his bank, there is the liability of the banker who pays cheques. This has been touched upon before. It remains here to notice some statutory enactments.

Statutory enactments.

Before 1853 cheques were always drawn payable to bearer,² so that a banker who paid one was not liable if the cheque was regularly drawn, however it might have been obtained.

16 & 17 Vict. c. 59.

By section 19 of 16 & 17 Vict. c. 59, "any draft or order drawn upon a banker for a sum of money payable to order or demand, which shall, when presented for payment, purport to be endorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer or holder thereof; and it shall not be incumbent on such banker to prove that such endorsement, or any subsequent endorsement, was made by or under the direction or authority of the person to whom the said draft or order was or is made payable, either by the drawer or any endorsee thereof."

45 & 46 Vict. c. 61.

This is substantially re-enacted in the Bills of Exchange Act, 1882.³

Crossed cheques.

A cheque may be crossed by the drawer, and after issue may be crossed generally or specially by the holder, who may also add the words "not negotiable."⁴

Duty of banker on whom a crossed cheque is drawn.

By the Bills of Exchange Act, 1882,⁵ the duty of a banker on

¹ Per Lord Ellenborough, *Rickford v. Ridge*, 2 Camp. 537, at 539. The rules for the presentation of a cheque within a reasonable time are summarized, *Chalmers, Bills of Exchange*, note to s. 74.

² *Vagliano Brothers v. Bank of England*, 22 Q. B. D. 103, per Charles, J., at 115. As to the origin and history of crossing cheques, and the effect of doing so at Common Law, see *Parke, B.'s judgment in Bellamy v. Marjoribanks*, 7 Ex. 389.

³ 45 & 46 Vict. c. 61, s. 60. See *Bissell v. Fox*, 51 L. T. 663.

⁴ 45 & 46 Vict. c. 61, s. 76.

⁵ 45 & 46 Vict. c. 61, s. 79, sub-s. 2. The law has been the subject of frequent amendments. 19 & 20 Vict. c. 25 provided that a crossed cheque should only be paid to or through some banker. This was held only to protect the drawee: *Ogden v. Benas*, L. R. 9 C. P. 513. In *Bobbett v. Pinkett*, 1 Ex. D. 368, the drawer recovered for money had and received against the transferee of a cheque, the indorsement of which was forged and which was paid to a person other than the banker in whose name it was crossed. In *Simmons v. Taylor*, 4 C. B. N. S. 463 the crossing was held no part of the cheque, and its fraudulent alteration no forgery; so that a payment without negligence, to the holder, not being a banker, of a draft the crossing of which has been fraudulently obliterated, was not a ground of action. 21 & 22 Vict. c. 79, amended the law to meet this state of things, and made fraudulent alteration forgery, though leaving the protection of the banker if the cheque were paid without negligence. Then came *Smith v. Union Bank*, 1 Q. B. Div. 31, which determined that the Act did not affect the negotiability of a cheque; so that, where a cheque was stolen and presented through another bank than

whom a crossed cheque is drawn is—if it is crossed generally, not to pay it otherwise than to a banker; if specially, not to pay it otherwise than to the banker to whom it is crossed. If the banker pays the cheque otherwise than as above, he will be liable to the true owner for any loss he may sustain by reason of the cheque having been so paid. If he pays it according to its tenor, in good faith and without negligence, he (and the drawer, if the cheque has come into the hands of the payee) will be entitled to the same rights and placed in the same position as if payment of the cheque had been made to the true owner thereof.¹

Where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or appears to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorized by the Bills of Exchange Act, 1882, the banker paying the cheque, and without negligence, shall not be responsible nor incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated, or having been added to or altered otherwise than as authorized by the Act, and of payment having been made otherwise than to a banker, or to the banker to whom the cheque is or was crossed, or to his agent for collection being a banker, as the case may be.²

A person taking a crossed cheque which bears on it the words “not negotiable” will not have, and will not be capable of giving, a better title to the cheque than that which the person from whom he took it had.³

Apart altogether from statute, the fact of a banker paying a crossed cheque otherwise than through another banker is evidence of negligence to render the banker responsible to his customer.⁴

A banker has a general lien upon all the securities, in his hands belonging to any particular person for his general balance, unless special circumstances exist which oust the ordinary rule. “No person,” says Lord Kenyon, C.J.,⁵ “can take any paper securities out of the hands of his banker without paying him his general

Cheque tampered with.

Crossed cheque marked “not negotiable.”

Crossed cheque paid otherwise than through banker.

Banker's lien.

that named in the crossing, it was held that the drawees who paid it were not liable in an action at the suit of the loser, as he was neither the holder nor was there privity nor statutory duty between him and the bank. The 39 & 40 Vict. c. 81 was the result of this decision. This is now repealed, and the provisions summarized in the text are the law. *Matthiessen v. London and County Bank*, 5 C. P. D. 7, was decided on section 12 of 39 & 40 Vict. c. 81. See *Stringfield v. Lanezari*, 16 L. T. (N. S.) 361, as to reasonable time of payment in to a banker of a crossed cheque.

¹ Sec. 80.

² Sec. 79, sub-s. 2.

³ Sec. 81. This is a re-enactment of 39 & 40 Vict. c. 81, s. 12.

⁴ *Bellamy v. Marjoribanks*, 7 Ex. 389; *Carlton v. Ireland*, 5 E. & B. 765; *Bobbett v. Pinkett*, 1 Ex. D. 368.

⁵ *Davis v. Bowsher*, 5 T. R. 488, at 492. Banker's lien is treated in the note to *Masonic Savings Bank v. Bang's Administrator*, 4 Am. St. R. 202, where the cases are collected.

Principle
stated by
James, L.J.

And by
Wright, J., in
Teale v.
Williams,
Brown and Co.

III. Banker
as pawnee.

Banker's lien
as pawnee.

IV. Bankers
may be ware-
housemen.

balance, unless such securities were delivered under a particular agreement which enables him so to do;" or, as the same principle was stated by James, L.J.,¹ "between banker and customer whatever number of accounts are kept in the books, the whole is really but one account, and it is not open to the customer, in the absence of some special contract, to say that the securities he deposits are only applicable to one account." In *Teale v. Williams, Brown and Co.*,² Wright, J., stated the rule to be that: "A banker with whom a customer opened several accounts had a lien upon all the accounts except (1) where there was a special agreement; (2) where specific property of a third person had been paid to the bank; (3) where the bankers had notice that when a customer drew upon a particular account it would be a fraud or breach of trust."

III. Another relation frequently constituted between a banker and his customer is that which makes the banker a pawnee of his customers' securities.

In this relation, again, bankers have most undoubtedly "a general lien on all securities deposited with them as bankers, by a customer, unless there be an express contract, or circumstances that shew an implied contract inconsistent with lien."³ This lien exists not only when the banker makes a loan on the pledge of these securities, but also where the customer overdraws his ordinary account. The banker's liability in respect of the securities appears to be that of a bailee for reward.⁴ The liability is thus stated in the Roman law:—*Ea igitur, quæ diligens paterfamilias in suis rebus præstare solet, a creditore exiguntur;*"⁵ and *Quia pignus utriusque gratia datur . . . placuit sufficere, quod ad eam rem custodiendam exactam diligentiam adhibeat; quam si præstiterit et aliquo fortuito casu eam rem amiserit, securum esse nec impediri creditum petere.*⁶ The amount of care exacted is that which an ordinary prudent man of business habits would use in the custody of his own securities.

IV. The last relation which it is necessary to notice here in which bankers stand to their customers is that of warehousemen of their plate, jewels, deeds, and securities.

The general aspects of this relationship have been already considered under the head "Deposit," and reference must be made to the cases there cited.⁷ The leading case on this point of

¹ *In re European Bank, Agra Bank claim*, L. R. 8 Ch. 41 at 44. *Robertson's Trustee v. Royal Bank of Scotland* (1890), 18 Rettie 12.

² 11 Times L. R. 56.

³ *Branda v. Barnett*, 12 Cl. & F. 787, per Lord Campbell, at 806; *London Chartered Bank of Australia v. White*, 4 App. Cas. 413.

⁴ *In re United Service Company, Johnston's Claim*, L. R. 6 Ch. 212, distinguished *Leese v. Martin*, L. R. 17 Eq. 224.

⁵ D. 13, 7, 14.

⁶ Inst. 3, 14, § 4.

⁷ *Ante*, 892.

law is *Giblin v. M'Mullen*¹ before the Judicial Committee of the Privy Council, affirming the decision of the Supreme Court of Victoria, which adopted as a correct expression the law as stated in *Addison on Contracts*² as follows :—"It is the custom of bankers to receive and keep, for the accommodation of their customers, boxes of plate and jewels, wills, deeds and securities; and, as no charge is made for the keeping of these things, they are gratuitous deposits. The bankers, therefore, are only bound to take ordinary care of them; and, if they are stolen by a clerk or servant employed about the bank, the bankers are not responsible, unless they have knowingly hired or kept in their service a dishonest servant."

Giblin v. M'Mullen.

Addison, Contracts.

In the argument of the appeal it was admitted that the appellants were gratuitous bailees;³ but it does not seem by any means clear that that is necessarily the position of a banker receiving securities for safe custody and without any special agreement. There has grown up a practice of customers sending their jewels and securities to bankers to be taken care of. But the banker discriminates between customers and those who have no existing relation with his bank. If the latter were to wish to place securities with him, he would either refuse or make a charge.⁴ The relations of his customer with him makes a difference in this respect, that he acts differently in the customer's case from what he would if the relation of customer did not exist. Then can it fairly be said that the position of a banker taking charge of securities for a customer is identical with that of a man entrusting his gold watch to a friend or locking up his deed-box in a neighbour's house while he goes out of town? Unless the position is identical, the banker can only be described as a gratuitous bailee in a strained and somewhat unnatural sense.

Bankers as gratuitous bailees.

This, however, is not the opinion of the American authorities. They approach the subject from a somewhat different point of view: "The bank cannot use the deposit in its business, and no such profit or credit from the holding of the money can arise as will convert the bank into a bailee for hire or reward of any kind. The bailment in such cases is purely gratuitous, and for the benefit of the bailor, and no loss can be cast upon the bank for a larceny unless there has been gross negligence in taking care of the

American authorities

¹ L. R. 2 P. C. 317; *Leese v. Martin*, L. R. 17 Eq. 224. All the chief cases are cited in *De Haven v. Kensington National Bank*, 81 Pa. St. 95.

² 6th ed. (Cave's), 406.

³ See per Lord Chelmsford, at 334. There were two counts to the declaration, the first alleging a bailment for reward, which the jury negatived. See *Dearborn v. Union National Bank*, 61 Me. 369; *Briggs v. Spaulding* 141 U. S. (34 Davis) 132.

⁴ *Pattison v. Syracuse National Bank*, 1 Hun (N. Y.) 606.

deposit."¹ The matter is there treated as purely one of law, but the difficulties of dealing with it in this way are wholly ignored, and therefore the weight of authority is not a little lessened.

¹ Per Agnew, C.J., in *Scott v. National Bank*, 72 Pa. St. 471 at 478, embodying the opinion of Parker, C.J., in *Foster v. Essex Bank*, 17 Mass. 479, at 501; and of Thompson, C.J., in *Lancaster Bank v. Smith*, 62 Pa. St. 47, at 54; this latter case does not raise the point, as the depositor was not a customer of the bank, while the bailment was absolutely gratuitous.

CHAPTER IV.

ESTOPPEL.¹

"ESTOPPE," says Sir Edward Coke,² "cometh of the French word *estoupe*, from whence the English word stopped; and it is called an estoppel or conclusion because a man's owne act or acceptance stoppeth or closeth up his mouth to alledge or plead the truth."

Definitions,
Sir Edward
Coke's.

"Estoppel" says Bowen, L.J.,³ "is only a rule of evidence; you cannot found an action upon estoppel. Estoppel is only important as being one step in the progress towards relief, on the hypothesis that the defendant is estopped from denying the truth of something which he has said. An illustration of a case of that kind of estoppel filling up the gap in the evidence which, when so filled up, would produce this right to relief, is found in the case of *In re Bahia v. San Francisco Railway Company*.⁴ *Burrows v. Lock*⁵ was a case of estoppel. As soon as we looked at the record it so appeared. It was a case where there was a right to relief on the hypothesis that the defendant was precluded from denying the truth of a particular fact."

Bowen, L.J.'s.

"Estoppel," says Lindley, L.J.,⁶ "is a rule of evidence which prevents a man from saying what is true."

Lindley, L.J.'s.

The law relating to estoppel is extensive, but only a small portion concerns us here—viz., that relating to estoppel by negligence.

Parke, B., in
Freeman v. Cooke,

The general rule is stated in *Freeman v. Cooke*⁷ by Parke, B.,

¹ Vin. Abr. Estoppel; *Doe v. Oliver*, 2 Sm. L. C. (9th ed.), 803 *cum notis*; Bigelow, Estoppel.

² Co. Litt. 352 a.

³ *Low v. Bouverie* (1891), 3 Ch. 82, at 105.

⁴ L. R. 3 Q. B. 584. See also *Hart v. Frontino and Bolivia South American Gold Mining Company*, L. R. 5 Ex. 111, commented on in *Simm v. Anglo-American Telegraph Company*, 5 Q. B. Div. 188.

⁵ 10 Ves. 470.

⁶ *Onward Building Society v. Smithson* (1893), 1 Ch. 1, at 14. To create an estoppel there must be a precise and specific averment of a particular fact: *Right v. Bucknell*, 2 B. & A. 278. "It is a rule that estoppels must be certain to every intent": per Williams, J., *Kepp v. Wiggett*, 10 C. B. 35, at 53.

⁷ 2 Ex. 654. There were earlier cases, as *Heane v. Rogers*, 9 B. & C. 577, *Graves*

adopting the definition of Lord Denman, C.J., in *Pickard v. Sears*.

Term
"wilfully"
explained.

adopting a previous definition of Lord Denman, C.J., in *Pickard v. Sears*,¹ "that where one by his words or conduct, *wilfully* causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as² to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." The term *wilfully*, as used by Lord Denman, is explained to mean: "If not that the party represents that to be true which he knows to be untrue, at least that he *means* his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct, by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect. As, for instance, a retiring partner, omitting to inform his customers of the *fact*, in the usual mode, that the continuing partners were no longer authorized to act as his agents, is bound by all the contracts made by them with third persons on the faith of their being so authorized." Further

v. Key, 3 B. & Ad. 313, holding that a receipt may be contradicted or explained; see *Lee v. Lancashire and Yorkshire Railway Company*, L. R. 6 Ch. 527, at 535, and *Mildmay v. Smith*, 2 Wms. Notes to Saund. 739, explained *Stimson v. Farnham*, L. R. 7 Q. B. 175. It was an ancient rule as to estoppel by statements in a deed that they must be clear and unambiguous in order to bind, Roll. Abr. Estoppel (P.), pl. 1 and 7, acted upon by Lord Cairns, C., in *Heath v. Crealock*, L. R. 10 Ch. 22, which case was followed by *Jessel, M.R., in General Finance Mortgage Discount Company v. Liberator Permanent Benefit Building Society*, 10 Ch. D. 15. "That certainty of statement," says Kay, L.J., "is also required to maintain an estoppel upon a statement not by deed appears from *Freeman v. Cooke*, where relief was refused upon the ground that no reasonable man would have acted on the faith of the statements made if they were taken together": *Low v. Bouverie* (1891), 3 Ch. 82, at 113.

¹ 6 A. & E. 469; see also *Gregg v. Wells*, 10 A. & E. 90, at 97, where Lord Denman, C.J., giving the judgment of the Queen's Bench said: "*Pickard v. Sears* was in my mind at the time of the trial, and the principle of that case may be stated even more broadly than it is there laid down. A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving." See *Knights v. Wiffen*, L. R. 5 Q. B. 660, considered in *Simm v. Anglo-American Telegraph Company*, 5 Q. B. Div. 188, and doubted in 1 *Langdell Cases on Sales*, 1028, also in *Am. Law Rev.* vol. vi. 470; *Henderson and Co. v. Williams* (1895), 1 Q. B. 521. See for early American decisions, in the same sense, *Stephens v. Baird*, 9 Cowen (N. Y.) 274; *Welland Canal Company v. Hathaway*, 8 Wend. (N. Y.) 480. The representation which induces the plaintiff's act must be "a misrepresentation in point of fact, and not merely of law": per *Mellish, L.J., Beattie v. Lord Ebury*, L. R. 7 Ch. 777, at 802. But see what is said in argument in the *H. of L.*, L. R. 7 H. L. 102, at 107: If "the misrepresentation of a legal right pretended to be possessed by the person who asserts it, and a man is injured thereby, he may claim compensation;" and the explanation of *Mellish, L.J.'s dictum* by *Honyman, J.*, in *Weeks v. Propert*, L. R. 8 C. P. 427, at 437, and by *Lush, J.*, in *McCollin v. Gilpin*, 5 Q. B. D. 390.

² In 2 Ex. "so as" is in error printed "or," as may be seen by reference to 6 A. & E. 474.

³ Cp. *Scarf v. Jardine*, 7 App. Cas. 345.

on in the same judgment, Parke, B., says that the representation that is necessary to work an estoppel must be "such as to amount to the contract or licence of the person making it."¹

This explanation of Parke, B., is further amplified by Pollock, C.B., in *Cornish v. Abington*,² as follows: "Lord Wensleydale, perceiving that the word 'wilfully' might be read as opposed not merely to 'involuntarily,' but to 'unintentionally,' shewed that if the representation was made voluntarily, though the effect on the mind of the hearer was produced unintentionally, the same result would follow. If a party uses language which, in the ordinary course of business and the general sense in which words are understood, conveys a certain meaning, he cannot afterwards say he is not bound if another, so understanding it, has acted upon it. If any person, by a course of conduct or by actual expressions, so conducts himself that another may reasonably infer the existence of an agreement or licence,³ whether the party intends that he should do so or not, it has the effect that the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct."

Parke, B.'s comment amplified in *Cornish v. Abington* by Pollock, C.B.

In *Howard v. Hudson*,⁴ too, Crompton, J., points out that the meaning of "wilfully" must be taken to be "*malo animo*, or with the intent to defraud or deceive, but so far wilfully that the party making the representation on which the other acts means it to be acted upon in that way."

Howard v. Hudson.

Lord Campbell⁵ describes the doctrine of estoppel as "found I believe in the laws of all civilized nations," and he states it as follows: "If a party having an interest to prevent an act being done, has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and

Lord Campbell's statement of the principle in *Cairncross v. Lorimer*.

¹ This statement of the law has been recognized in *Jordan v. Money*, 5 H. L. C. 185, at 214, 255; *Clark v. Hart*, 6 H. L. C. 633 at 656; *Howard v. Hudson*, 2 E. & B. 1, at 10; *Swan v. North British Australasian Company*, 2 H. & C. 175 at 177, 181, 188; *Polak v. Everett*, 1 Q. B. D. 669; *Miles v. M'Ilwraith*, 8 App. Cas. 120 at 133; *M'Kenzie v. British Linen Company*, 6 App. Cas. 82, at 101.

² 4 H. & N. 549, at 555.

³ This test of an agreement or licence is also adopted by Lord Campbell C., in *Cairncross v. Lorimer*, 3 Macq. (H. L. Sc.) 827, at 830. The American law seems to be the same, *Sessions v. Rice*, 70 Iowa 306, at 310. "The test question is whether the party setting up the estoppel was justified in relying upon the conduct of the other party." "Every person will be conclusively presumed to intend to be understood according to the reasonable import of his words; and where a person's words are thus reasonably understood, and justly acted upon by another, such person cannot be heard to aver to the contrary as against the other": *Morgan v. Railroad Company*, 96 U. S. (6 Otto) 716.

⁴ 2 E. & B. 1.

⁵ *Cairncross v. Lorimer*, 3 Macq. (H. L. Sc.) 827, at 829. See also a similar statement by the same learned judge in *Piggott v. Stratton*, 1 De G. F. & J. 33, at 49, and the comment thereon of Kay, L.J., in *Low v. Bouverie* (1891) 3 Ch. 82, at 110.

⁶ 3 Macq. (H. L. Sc.) at 830.

Lord Black-
burn's in
Burkinshaw
v. Nicolls.

the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had it been done by his previous licence." And Lord Blackburn's¹ statement is not less forcible: "When a person makes to another the representation, 'I take upon myself to say such and such things do exist and you may act upon the basis that they do exist,' and the other man does really act upon that basis, it seems to me it is of the very essence of justice that, between those two parties, their rights should be regulated, not by the real state of the facts, but by that conventional state of facts which the two parties agree to make the basis of their action."

Ground of the
doctrine.

This doctrine of estoppel *in pais* is aimed at the preventing injustice where one party has been led into error by the fault or fraud of the other. But it can have no application unless the party invoking it can show that he has been induced to act or refrain from acting by the acts or conduct of the adverse party in circumstances that would naturally and rationally influence ordinary men. Thus it can only be set up by one who has been actually misled to his injury; for if not misled he can have no ground for the protection of the principles he invokes.²

Rule laid down
by Wilde, B.;

In *Swan v. North British Australasian Company*, in the Court of Exchequer,³ Wilde, B., formulated the propositions: "That if a man has wilfully made a false assertion calculated to lead others to act upon it, and they have done so to their prejudice, he is forbidden, as against them, to deny that assertion. That if he has led others into the belief of a certain state of facts by conduct of culpable neglect calculated to have that result, and they have acted on that belief to their prejudice, he shall not be heard afterwards as against such persons to shew that state of facts did not exist. In short, and in popular language, a man is not permitted to charge the consequences of his own *fault* on others, and complain of that which he has himself brought about."

qualified in
the Exchequer
Chamber by
Blackburn, J.

In the Exchequer Chamber, Blackburn, J.,⁴ characterized this

¹ *Burkinshaw v. Nicolls*, 3 App. Cas. 1004, at 1026. The doctrine of estoppel by representation is applicable only to representations as to an existing state of facts, not to promises *de futuro*, which, if binding at all, must be binding as contracts, *Maddison v. Alderson*, 8 App. Cas. 467.

² *Hardy v. Chesapeake Bank*, 51 Md. 562, at 589, summarized. In *Morgan v. Railroad Company*, 96 U. S. (6 Otto), 716 at 720, it is said always to presuppose "error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage." There is an examination of the leading cases in which the principle of estoppel by conduct has been applied in the judgment in *Leather Manufacturers' Bank v. Morgan*, 117 U. S. (10 Davis) 96, at 108-112.

³ 7 H. & N. 603, at 633.

⁴ 2 H. & C., 175, at 182.

as "very nearly right, but, in my opinion, not quite," and he proceeds to qualify it by two provisos:

First, that "the neglect must be in the transaction itself, and be the proximate cause of the leading the party into that mistake ;"

Secondly, the neglect " must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public, of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy."¹

In *Carr v. London and North-Western Railway Company*,² Brett, J., drew up four propositions on the same subject :³

Carr v. London and North-Western Railway Company.
Four propositions by Brett, J.

1. If a man by his words or conduct wilfully endeavours to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such state of things and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist.⁴

2. If a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts.

3. If a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to

¹ In *Hunter v. Walters*, L. R. 7 Ch. 75 at 87, Mellish, L.J., says: "It is still a doubtful question at law . . . whether, if there be a false representation respecting the contents of a deed, a person who is an educated person, and who might, by very simple means, have satisfied himself as to what the contents of the deed really were, may not, by executing it negligently, be estopped as between himself and a person who innocently acts upon the faith of the deed being valid, and who accepts an estate under it. I do not think that the case of *Swan v. North British Australasian Company*, a decision of which the learned Vice-Chancellor disapproves, is really a direct authority upon that question. . . . That decision does not go to the extent of saying that if the broker had filled them up with the same shares which he was authorized to insert and therefore had done what he was authorized to do, that then, because it was void at law from being executed in blank, nevertheless the principal might not have been estopped."

² L. R. 10 C. P. 307; *Farmeloe v. Bain*, 1 C. P. D. 445; *Coventry v. Great Eastern Railway Company*, 11 Q. B. Div. 776; *Seton v. Lafone*, 19 Q. B. Div. 68.

³ L. R. 10 C. P. at 316.

⁴ *Wright v. Snowe*, 2 De G. and S. 321, is the case of a minor who represented himself to be of full age, and executed a release to another. It was held immaterial whether he was aware or not of the incorrectness of his misrepresentation.

his damage, the first is estopped from denying that the facts were as represented.

4. If, in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led, the other to act by mistake upon such belief, to his prejudice, the second cannot be heard afterwards, as against the first, to shew that the state of facts referred to did not exist.¹

Summed up
by James,
L.J., in *Ex
parte Adam-
son, In re
Collie.*

These are all condensed in the expression of James, L.J., in *Ex parte Adamson, In re Collie*:² "Nobody ought to be estopped from averring the truth or asserting a just demand, unless, by his acts or words or neglect, his now averring the truth or asserting the demand would work some wrong to some other person who has been induced to do something, or to abstain from doing something, by reason of what he had said or done or omitted to say or do."

*M'Kenzie v.
British Linen
Company.*

*M'Kenzie v. British Linen Company*³ excellently illustrates this. The appellant did not inform the respondents that his signature to a certain bill in their hands was a forgery from the 17th of July till the 29th of July, at which latter date he gave the information. At that time the bank was in no worse position than it was when he first was able to give the information to them. The Court of Session held the appellant estopped by his negligence from setting up that the signature was a forgery; the House of Lords reversed this decision as being "contrary to justice"⁴ to hold a man responsible for not giving information where, had he given any, the position of the other party would in no degree have been bettered. While thus deciding, the House of Lords carefully provided for the case where the rights of a party are altered for the worse by reason of his abstention. "It would be a most unreasonable thing to permit a man, who knew the bank were relying upon his forged signature to a bill, to lie by, and not to divulge the fact until he saw that the position of the bank was altered for the worse."⁵ In *Cornish v Abington*,⁶ on the contrary, the jury drew an inference that the

¹ See *Rumball v. Metropolitan Bank*, 2 Q. B. D. 194.

² 8 Ch. Div. 807, at 817. Kay, L.J., in *Low v. Bouverie* (1891), 3 Ch. 82, at 111, 112, has stated six propositions on the law of estoppel that should be referred to.

³ 6 App. Cas. 82. The American cases are cited in *Allen v. Shaw*, 61 N. H. 95. Two valuable Canadian Cases, *Ryan v. Bank of Montreal*, 14 Ont. App. 533, and *Merchants Bank v. Lucas*, 15 Ont. App. 573, affirmed 18 Can. S. C. R. 704, should be referred to for the admirable and exhaustive judgments they contain dealing with the whole of this matter.

⁴ Per Lord Watson, 6 App. Cas. at 109.

⁵ *Ibid.*

⁶ 4 H. & N. 549.

plaintiff was prejudiced, and a verdict was accordingly entered for him.

*Morris v. Bethell*¹ affords the extremest expression of the other aspect of the principle from that given effect to in *M'Kenzie v. British Linen Company*. There it was held² that "one who pays one bill which purports to bear his signature as acceptor, thereby makes evidence against himself that the person who wrote the acceptance did so with his authority; and, if the bill be given in the course of business implying a continuance of such authority, it may be conclusive evidence."³

Between these limits, on the one side, where the abstaining from volunteering information causes no injury, and, on the other, where a similar abstinence is in connection with a course of business that involves an admission of authority, the inference to be drawn is for the jury.

The case of a man signing a deed or document under a mistake as to its contents, or as to their operation, and the case of a signature to a document given under the belief that it was a different document from what it proves to be, must be discriminated. Thus Lord Hatherley, C., in *Hunter v. Walters*,⁴ says: "In the early books we find Lord Coke saying that if a man is blind or illiterate, and an instrument is read over to him falsely, then the instrument is void. . . . I apprehend that if a man executes a solemn instrument by which he conveys an interest, and if he signs on the back a receipt for money—a document which, as the Vice-Chancellor observes, could not be mistaken—he cannot affect not to know what he was doing, and it is not enough for him afterwards to say that he thought it was only a form. That merely amounts to saying that a misrepresentation was made to him, under which he executed a deed; still the deed may have been exactly what he intended to execute, though he intended it to be used for a totally different purpose. But this does not affect the deed. The fraud of the person who used the deed for a different purpose does not make it less the deed of the person who executed it." And James, L.J., says:⁵ "To my mind it is almost ludicrous to contend, and it would be most injurious to hold, that a man executing a deed and signing a receipt as a matter of form should be able to say that it is a

¹ L. R. 5 C. P. 47.

² Per Willes, J., *l. c.* at 51.

³ Cp. *Trickett v. Tomlinson*, 13 C. B. N. S. 663; *Bank of England v. Vagliano Brothers* (1891), App. Cas. 107.

⁴ L. R. 7 Ch. 75, at 81, 82; referring to *Thoroughgood's Case*, 2 Co. Rep. 9 b.; *Manser's Case*, 2 Co. Rep. 3 a.; see Vin. Abr. *Fait* (S.); *Bedell v. Herring*, 11 Am. St. R. 307, note at 318. Compare judgment of Fry, L.J., *Imperial Loan Company v. Stone* (1892), 1 Q. B. 599, at 601.

⁵ L. R. 7 Ch. at 84.

nullity. Many young men put their names to pieces of paper upon the representation that it is a mere matter of form, and that they will never hear any more of it. They learn by experience that the form is a painful substance. Many a trustee has endeavoured in vain in this Court to escape from the consequence of his acts by saying, 'I signed a deed, and I signed a receipt for money as a matter of conformity'; which is another mode of saying I executed it as a matter of form. 'But those trustees have been made most painfully to learn that the instrument they have so signed will, with the consequences, follow them, and cause them to suffer for their negligence.'¹

Hunter v.
Walters and
Foster v.
Mackinnon
distinguished.

By Byles, J.

In *Hunter v. Walters*, accordingly, the plaintiff was held bound, on the ground that he in fact intended to execute a deed, and the circumstances in which he carried out his intention did not make void what he had actually intended to do. But in *Foster v. Mackinnon*,² the defendant was induced to put his name upon the back of a bill by the fraudulent representation that he was signing a guarantee; and was held not bound by his signature, because he never intended to indorse a bill, but his signature was intended to be attached to a document of another sort. Byles, J., thus states the distinction:³ "It was not his (defendant's) design, and if he were guilty of no negligence, it was not even his fault, that the instrument he signed turned out to be a bill of exchange. It was as if he had written his name on a sheet of paper for the purpose of franking a letter, or in a lady's album, or on an order for admission to the Temple Church, or on the flyleaf of a book, and there had already been, without his knowledge, a bill of exchange or a promissory note, payable to order, inscribed on the other side of the paper. To make the case clearer, suppose the bill or note on the other side of the paper in each of these cases to be written at a time subsequent to the signature, then the fraudulent misapplication of that genuine signature to a different purpose would have been a counterfeit alteration of a writing, with an intent to defraud, and would therefore have amounted to forgery. In that case the signer would not have been bound by his signature for two reasons—first, that he never in fact signed the writing declared on; and, secondly, that he never intended to sign any such contract."⁴

Duty to amend
representation
originally
correctly made.

A duty may arise to amend representations which when made

¹ But see now as to this last illustration the Trustees Act, 1893 (56 & 57 Vict. c. 53), s. 24. *Ante*, 1507. Cp. the Scotch case of *Young v. Clydesdale Bank, Limited*, 17 Rettie 231.

² L. R. 4 C. P. 704; *Onward Building Society v. Smithson* (1893), 1 Ch. 1.

³ L. c. at 712.

⁴ Cp. *London and South Western Bank, Limited, v. Wentworth*, 5 Ex. D. 96. The distinction pointed out in the text is very fully and ably discussed in a New Zealand case, *Bank of Australasia v. Reynell*, 10 N. Z. L. R. 257 (C. A.).

were absolutely correct. The principle applicable is stated by Turner, L.J., in *Traill v. Baring*:¹ "I take it to be quite clear, that if a person makes a representation by which he induces another to take a particular course, and the circumstances are afterwards altered to the knowledge of the party making the representation, but not to the knowledge of the party to whom the representation is made, and are so altered that the alteration of the circumstances may affect the course of conduct which may be pursued by the party to whom the representation is made, it is the imperative duty of the party who has made the representation to communicate to the party to whom the representation has been made the alteration of those circumstances; and that this Court will not hold the party to whom the representation has been made, bound, unless such a communication has been made."²

One other limitation ought to be noticed. Where the ground of action is a misrepresentation, it must be "of existing facts, and not of a mere intention," since "in the former case it is a contract, in the latter it is not."³

A word should be said here about acquiescence, which is sometimes used in a sense short of expressing the meaning of adoption or ratification.⁴ Its proper meaning, as stated by Lord Cottenham in the case last cited, is, where "a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, then the person so acquiescing cannot afterwards complain. When, however, the act is completed without intimation to him whose right is infringed, he has

¹ 4 De G. J. & S. 318, at 329.

² See per Fry, L.J., *In re Scottish Petroleum Company*, 23 Ch. Div. 413, at 438. The distinction between a representation made independent of duty and a representation made in the course of duty has been already touched on, *ante*, 1474.

³ *Jorden v. Money*, 5 H. L. C. 185. See per Lord Selborne, C., *Maddison v. Alderson*, 8 App. Cas. 467, at 473, where *Loffus v. Maw*, 3 Giff. 592, is in effect overruled. In *Pollock, Contracts* (6th ed.), there is a note at 711-719, "On the supposed equitable doctrine of 'making representations good,'" where the chief cases in this connection are discussed. As to the law applicable where misrepresentations have induced one to enter into a contract which he wishes to rescind, and the distinction between a fraudulent representation and an innocent misrepresentation, see the judgment of Blackburn, J., *Kennedy v. Panama, &c. Mail Company*, L. R. 2 Q. B. 580, at 586, *et seqq.*

⁴ *Duke of Leeds v. Earl of Amherst*, 2 Ph. 117, at 123. As to acquiescence, see further *La Banque Jacques-Cartier* and *La Banque D'Épargne de la cité et du district de Montreal*, 13 App. Cas. 111, where, at 118, it is said: "Acquiescence and ratification must be founded on a full knowledge of the facts, and further it must be in relation to a transaction which may be valid in itself and not illegal, and to which effect may be given as against the party by his acquiescence in and adoption of the transaction." *Ante*, 1518. See *Evans v. Smallcombe*, L. R. 3 H. L. 249, per Lord Cairns, C., at 256, and *Willmott v. Barber*, 15 Ch. D. 96, at 105, where Fry, J., says, "It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true position. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights." *Ante*, 882.

thereupon a right of action, which, as a general rule, cannot be divested without accord and satisfaction, or release under seal.

Considered by
Thesiger,
L.J.

"Mere submission to the injury," says Thesiger, L.J.,¹ for any time short of the period limited by statute for the enforcement of the right of action cannot take away such right, although under the name of *laches* it may afford a ground for refusing relief under some particular circumstances;² and it is clear that even an express promise by the person injured that he would not take any legal proceedings to redress the injury done to him could not by itself constitute a bar to such proceedings, for the promise would be without consideration and therefore not binding."

Lord Cran-
worth in
Ramsden v.
Dyson.

On the other hand, as is pointed out by Lord Cranworth in *Ramsden v. Dyson*,³ "If a stranger begins to build on my land, supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that when I saw the mistake into which he had fallen, it was my duty to be active, and to state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented."

Principle that
vendor of
property can
transmit no
greater title
than he has
covers differ-
ent ground.

It is a well-recognized rule that to property, other than negotiable securities, a vendor or pledgor can transmit no greater title than he has. This, however, is a principle independent of that now asserted, that where the true owner holds out another or for the purpose of inducing the belief allows another to appear as owning or with dispositive power over his property which innocent third parties are led into dealing with by his action or conduct, on the basis of the apparent being the true owner, their rights in such a case will not depend upon the actual title or authority of the person with whom they directly deal, but will be referred back to that conduct of the real owner by which their dealings are induced; and the real owner will be precluded thereby as against the innocent third parties from disputing the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in that person with whom they immediately deal.⁴

¹ *De Buseche v. Alt*, 8. Ch. Div. 286, at 314.

² For what such circumstances are see *Allcard v. Skinner*, 36 Ch. Div. 145; *Blake v. Gale*, 32 Ch. D. 571; *Beningfield v. Baxter*, 11 App. Cas. 167. *Ante*, 1511 and 1552.

³ L. R. 1 H. L. 129, at 140.

⁴ *Pickering v. Busk*, 15 East 38; *Gregg v. Wells*, 10 A. & E. 90; *Cowdrey v. Vandenberg*, 101 U. S. (10 Otto) 572. As regards the sale of goods, this is established by the Sale of Goods Act 1893 (56 & 57 Vict. c. 71), ss. 23, 25.

Having ascertained the general principles applicable in this description of estoppel, it remains to consider the cases which have been regarded as illustrating its operation.

The case as to which there has been most controversy is *Young v. Grote*.¹ A customer of a banker delivered certain printed cheques to his wife signed by himself, but with blanks which he instructed his wife to fill up according as his business demanded. She filled up one with the words *fifty pounds two shillings*, the *fifty* being commenced with a small letter and placed in the middle of a line. The figures 50:2 were also placed at a considerable distance from the printed £. In this state the cheque was delivered to a clerk to receive the amount, who inserted at the beginning of the line in which the word *fifty* was written the words *Three hundred and*, and the figure 3 between the £ and the 50. This was paid by the bankers. The Court of Common Pleas held that the customer must bear the loss.

Young v. Grote.

The ground of this decision has been the subject of much difference of opinion, although the ground on which the case was actually decided is most unequivocally stated by Best, C.J.:² "We decide here on the ground that the banker has been misled by want of proper caution on the part of his customer." In the view of Cockburn, C.J.,³ the case, "which is supposed to have established this doctrine of estoppel by reason of negligence, when it comes to be more closely examined, turns out to have been decided without reference to estoppel at all. Neither the counsel in arguing that case, nor the judges in deciding it, refer once to the doctrine of estoppel." The conclusion was, the learned judge considered, arrived at to avoid circuity of action; since, looked at technically, "the customer would be entitled to recover from the banker the amount paid on such a cheque, the banker having no voucher to justify the payment; the banker, on the other hand, would be entitled to recover against the customer for the loss sustained through the negligence of the latter."⁴ This view has also been adopted by the Court of Exchequer⁵ in *Halifax Union v. Wheelwright*,⁶ and by the Supreme Court of Massachusetts in *Greenfield Savings Bank v. Stowell*.⁷ Cockburn, C.J., refers to *Young v. Grote*, again, in *Johnson v. Credit Lyonnais Company*,⁸ where he says: "The case of *Young v. Grote* is, as

The case considered. Cockburn, C.J.'s, view in *Swan v. North British Australasian Company.*

In *Johnson v. Credit Lyonnais Company.*

¹ 4 Bing. 253. Cp. *Marcussen v. Birkbeck Bank*, 5 Times L. R. 463.

² 4 Bing. at 259.

³ *Swan v. North British Australasian Company*, 2 H. & C. 175, at 189.

⁴ L. c. at 190.

⁵ *Cleasby, B.*, delivering the judgment of himself and Pollock and Amphlett, BB. (1873) L. R. 10 Ex. 183.

⁶ 123 Mass. 196, 25 Am. R. 67; *Fordyce v. Kosminski*, 4 Am. St. R. 18.

⁸ 3 C. P. Div. 32, at 43.

was pointed out in the case just now referred to,¹ plainly distinguishable. For there, there was a duty on the part of the customer to use due care in drawing the cheque, so as to protect the banker against the risk of forgery in the amount for which the cheque was drawn."

Lord Cranworth's view in *Orr v. Union Bank of Scotland*;

On the other hand, the Lord Chancellor (Cranworth), in *Orr v. Union Bank of Scotland*,² expressly affirms that the ground on which *Young v. Grote* was decided was estoppel. "Whether the conclusion in point of fact was in that case well warranted is not important to consider. The principle is a sound one, that where the customer's neglect of due caution has caused his bankers to make a payment on a forged order he shall not set up against them the invalidity of a document which he has induced them to act on as genuine." Again, in moving the judgment of the House of Lords in *Bank of Ireland v. Trustees of Evans's Charities*,³ though he treats estoppel as the basis of the decision, he declines to express an opinion whether the facts in law amounted to estoppel. Further, Parke, B.,⁴ delivering the opinion of the judges in the same case, says that in *Young v. Grote* "it was held to have been the fault of the drawer of the cheque that he misled the banker on whom it was drawn by want of proper caution in the mode of drawing the cheque, which admitted of easy interpolation, and consequently, that the drawer, having thus caused the banker to pay the forged cheque by his own neglect in the mode of drawing the cheque itself, could not complain of that payment."⁵

in *Bank of Ireland v. Trustees of Evans's Charities*.

Parke, B.'s, view in *Bank of Ireland v. Evans's Trustees*;

In *Roberts v. Tucker*.

Previously to this the reporter in Queen's Bench Reports attributes to Parke, B., delivering his oral judgment in the Exchequer Chamber in *Roberts v. Tucker*,⁶ the statement⁷ that in

¹ 2 *Swan v. North British Australasian Company*, 2 H. & C. 175. See the judgment of Williams, J., 7 C. B. N. S. 400, at 444.

² 1 Macq. (H. L. Sc.) 513, at 523.

³ 5 H. L. C. 389, at 413. See, too, per Erle, C.J., *Ex parte Swan*, 7 C. B. N. S. 400 at 431. As to the summary power to rectify the register, which was the main point considered in *Ex parte Swan*, see *Ex parte Shaw*, 2 Q. B. D. 463. As to registration, see per Lord Blackburn, *Société Générale de Paris v. Walker*, 11 App. Cas. 20, at 34.

⁴ 5 H. L. C. at 410.
⁵ It will be observed that this expression is with reference to the question of whether the negligence was *proximate* or *remote*, the point then under discussion, and not with regard to the general merits of the case; and that the point subsequently taken, that the negligence to be effectual had to work through the operation of a crime was not referred to.

⁶ 16 Q. B. 560.

⁷ Cited by Williams, J., *Ex parte Swan*, 7 C. B. N. S. 400, at 445; by Lord Coleridge, C.J., *Arnold v. Cheque Bank*, 1 C. P. D. 578, at 587; and by Lord Esher, M.R., *Scholfield v. Earl of Lonsborough* (1895), 1 Q. B. 536, at 543. Even if Parke, B., used the words attributed to him, which is doubtful, with the meaning attributed to him, which is also doubtful, his subsequent words embodying the opinion of himself and the other common law judges must operate as a retraction. Compare *Schultz v. Askey*, 2 Scott 815, 7 C. & P. 99, a case which Crompton, J., in *Stoessiger v. South-Eastern Railway Company*, 3 E. & B. 549, at 556, regards as going "to the utmost extent of the law."

Young v. Grote the customer had by signing a blank cheque given authority to any person in whose hands it was to fill up the cheque in whatever way the blank permitted." It is nevertheless by no means certain that Parke, B.'s, words are given with absolute accuracy; for in the report in *The Jurist*¹ the words attributed to him are: "In that case [Young v. Grote] there was negligence in the drawing of the cheque itself, which was the authority given by the drawers to the bank"; while in the *Law Journal*² the words are: "There [in Young v. Grote] the Court held that the cheque was drawn in so negligent a way as to facilitate the forgery and to exonerate the banker from liability to his customer for paying the amount. They, in truth, consider that he, as it were, gave authority to the party to fill up the cheque in the way it was filled up." This is substantially what is said above, and the presumption of authority must operate by estoppel; since the drawer, not having in fact given such authority, could only be held in law to have given it by precluding him from shewing what the real facts were; either in virtue of a rule of the law merchant, which would operate *through* estoppel, or directly by reference to the doctrine of estoppel, without the intervention of any intermediate principle.

In *Barker v. Sterne*,³ Pollock, C.B., thus comments on Young v. Grote: "There is a case where a customer of a banker on leaving home, gave to his wife several blank forms of cheques signed by himself, and desired her to fill them up according to the exigency of his business. She filled up one of them so carelessly that a clerk to whom she delivered it was enabled to alter the amount to a larger sum in such a way that the bankers could not discover the alteration and they paid it; it was held that the loss must fall on the drawer as it was caused by his negligence. Now, whether the better ground for supporting that decision is that the drawer is responsible for his negligence, which has enabled a fraud to be practised, or whether it be considered that, when a person issues a document of that kind, the rest of the world must judge of the authority to fill it up by the paper itself, and not by any private instructions, it is unnecessary to inquire. I should prefer putting it on the latter ground."⁴

Lord Coleridge, C.J., in *Arnold v. Cheque Bank*,⁵ regards the principle underlying Young v. Grote as being that whenever one of two innocent parties must suffer by the act of a third

Variations in the reports of Parke, B.'s, judgment.

Barker v. Sterne.
Comment on Young v. Grote by Pollock, C.B.

Lord Coleridge's comment in *Arnold v. Cheque Bank*.

¹ 15 Jur. 988.

² 20 L. J. Q. B. at 273.

³ 9 Ex. 684, at 686.

⁴ See per Blackburn, J., *Gumm v. Tyrie*, 4 B. & S. 680, at 713.

⁵ 1 C. P. D. 578.

person, he who has enabled such person to occasion the loss must sustain it; a view which involves the essential element in estoppel—the effort of the law to prevent wrong being worked to any one through conduct induced by the act of another.¹

Putting aside the question of the precise ground on which *Young v. Grote* was decided, a more important question arises, whether it was correctly decided in view of the later cases.

Baxendale v. Bennett.

The first of these to notice is *Baxendale v. Bennett*.² Defendant drew a bill, without a drawer's name, addressed to himself, and wrote an acceptance across it. In this condition it was stolen, filled up with a drawer's name, and transferred to the plaintiff, a *bona fide* holder for value. Though it was possible that the bill might have been made a complete instrument without a crime,³ in fact a crime was committed by stealing the document; and without that the bill could not have been completed. At the trial the learned judge ruled, on the authority of *Young v. Grote* and *Ingham v. Primrose*,⁴ that the defendants were liable. His judgment was reversed in the Court of Appeal, and entered for the defendant. In the Court of Appeal, Brett, L.J., relied mainly on the fact that the acceptance was not issued by the defendant, and that the defendant never authorized the bill to be filled in with a drawer's name, so that he could not be sued thereon, and declined to enquire whether the defendant was negligent, because the defendant did not owe a duty to any one, and, by putting the bill into a drawer in his own room, he did not act otherwise than an ordinary careful man would act. Bramwell, L.J., assumed that the defendant had been negligent, but considered his negligence not the proximate or effective cause of the fraud; he lays considerable stress on a distinction between the cases cited and that before the Court; in them the instruments had been parted with voluntarily, but in the case before the Court the bill had been obtained by the commission of a crime.

Ground of Brett, L.J.'s, decision.

Ground of Bramwell, L.J.'s, decision.

The distinction at first sight seems fine between an instrument

¹ See per Lord Field, *Bank of England v. Vagliano Brothers* (1891), App. Cas. 107, at 170, where the learned Lord says "that case, [*Young v. Grote*] no doubt, must be considered as well decided."

² 3 Q. B. Div. 525. Cp. *In re Cooper, Cooper v. Vesey*, 20 Ch. D. 611. "It cannot make any difference whether" a "stranger bear the same name with the real payee or not; for no person can give a title to a bill but he (*sic*) to whom it is made payable": *Mead v. Young*, 4 T. R. 28, per Buller, J., at 31. In *District of Columbia v. Cornell*, 130 U. S. (23 Davis) 655, negotiable certificates, which had been cancelled, had the marks of cancellation fraudulently effaced by a clerk and were reissued by him. Held that a purchaser in good faith and for value before maturity could not recover, *Cooke v. United States*, 91 U. S. (1 Otto) 389, being much pressed upon the Court, who were "not prepared to extend the scope of that decision."

³ See per Bramwell, L.J., 3 Q. B. Div. at 530.

⁴ 7 C. B. N. S. 82.

obtained by a crime and negotiated, and one which has lawfully come into possession of a person, and in respect of which, subsequently, a crime has been committed to give it its effect. In either view something has been done the defendant could not be supposed to anticipate, in one sense at least, else he would be an accomplice and the appropriate subject of the criminal law.

This is the view of Bovill, C.J., in *Société Générale v. Metropolitan Bank*,¹ a case where "eight days" was altered to "eighty days" in a bill of exchange, Bovill, C.J., says: "Here the printed form was filled up with 'eight days,' and it is said there was negligence in allowing sufficient space for the addition of the letter 'y,' but I cannot, sitting as a jury, say there was negligence enabling the forgery to be committed. It would be ridiculous to expect all persons to exclude such a possibility as that. This was the usual course of filling up blanks in a form, and a man is not to assume that a forgery will be committed."² The weakness of *Young v. Grote*, it is urged by some of its critics, is that precisely this general assumption is made. If, it is objected by them, a man is only liable for the natural results of his actions, and if a forgery is not the natural result of leaving a blank in a cheque or bill of exchange, it is difficult to see why the drawer of a cheque or the acceptor of a bill of exchange should be precluded by estoppel from averring the forgery, or held guilty of negligence in not anticipating it.³

Bovill, C.J.,
in *Société
Générale v.
Metropolitan
Bank*.

*Young v.
Grote* com-
pared with
this case.

Brett, L.J., in *Baxendale v. Bennett*, does not hesitate to express his opinion that the decision in *Young v. Grote* is unsatisfactory,⁴ at any rate, so far as the principle asserted therein is extended beyond the relation of banker and customer. Bramwell, L.J., seeks to save the authority of the case by a distinction, before alluded to, between a voluntary and an involuntary parting with the instrument. Still, this does not touch the difficulty where the owner's negligence renders the taking of the instrument possible or likely, though he is himself in fact not consenting to the issue of it. The force of this argument Bramwell, L.J., meets by holding that the commission of a

Brett, L.J.'s,
and Bramwell,
L.J.'s, views
as to *Young v.
Grote*.

¹ 21 W. R. 335. See *Marcussen v. Birkbeck Bank*, 5 Times L. R. 463.

² Of course this is otherwise where a cheque has been indorsed in blank, and subsequently filled up without fraud. See per Buller, J., in *Lickbarrow v. Mason*, 1 Sm. L. Cas. (9th ed.) 737, citing *Russel v. Langstaffe*, Doug. 496 (in the 4th ed.), 2 Doug. 514; *Awde v. Dixon*, per Parke, B., 6 Ex. 869; *London and South-Western Bank v. Wentworth*, 5 Ex. D. 96.

³ See Bigelow, *Estoppel* (4th ed.), 512. Bowen, L. J., avoids this difficulty in his judgment in *Garrard v. Lewis*, 10 Q. B. D. 30, by deciding on the ground that he who gives an acceptance in blank (which he held was in effect done in that case) holds out the person he entrusts therewith as having authority to fill in the bill as he pleases within the limits of the stamp. See *France v. Clark*, 26 Ch. Div. 257; *Fox v. Martin*, W. N. (1895), 36.

⁴ 3 Q. B. Div. 525, at 533.

crime is not the proximate result of negligence in leaving an instrument in a place where it may be wrongfully obtained possession of.¹ But if the commission of a crime is not to be anticipated in the case of an involuntary issue, why should it any more in the case of a voluntary issue, where the issuer acted, if negligently, yet in good faith? The answer is, that the owner negligently issues the instrument, and *therefore* is bound. He is even then not liable for *all* the consequences of his acts, but only for the ordinary and natural consequences of them; and the issue is narrowed down to whether the forgery or alteration of an instrument negligently and voluntarily issued is one of these. Bramwell, L.J., holds that where a crime is necessary for the completion of the act causing injury, the negligence cannot be considered proximate. Brett, L.J., does not consider the question of negligence, and condemns the wider view of the bearing of *Young v. Grote* more directly, and apparently on the ground that the commission of a crime is not the subject of legal intendment, and this irrespective of any question of negligence or diligence.

Day, J.'s,
opinion in
*Merchants of
the Staple of
England v.
Bank of
England*.

It must not be omitted that Day, J., in *Merchants of the Staple of England v. Bank of England*,² vouched the authority of *Young v. Grote*, which he "ventured respectfully to think was most properly decided."

*Greenfield
Savings Bank
v. Stowell*.

*Greenfield Savings Bank v. Stowell*³ is the most important of the American cases in which *Young v. Grote* is criticized. There the question discussed was whether the maker of a promissory note was under a liability to subsequent indorsees in respect of an alteration made in the note after it had left the hands of the maker. *Young v. Grote* was cited as an authority in favour of the existence of the duty, but after an elaborate examination was distinguished as applying only where the relation of banker and customer exists. "The maker of a promissory note holds no such relation to the indorsees thereof as a customer does to his banker. The relation between banker and customer is created by their own contract, by which the banker is bound to honour the customer's drafts; and if the negligence of the customer affords opportunity to a clerk or other person in his employ to add to the terms of a draft and thereby mislead the banker, the

¹ Cp. per Lord Coleridge, C.J., *Arnold v. Cheque Bank*, 1 C. P. D. 578, at 589.

² 21 Q. B. D. 160, at 163. A contrary opinion has been expressed in *Burrows v. Klunk*, 70 Md. 451, 14 Am. St. R. 371, where it is said: "The case of *Young v. Grote*, though it has not, so far as we can ascertain, been directly overruled, has been seriously questioned, not so much as to its result, but as to the reasoning on which it is founded. Subsequent comments of the English judges go far to limit the doctrine there laid down to the peculiar circumstances of that case. All the decisions containing the comments made up to that time are referred to in *Greenfield Savings Bank v. Stowell*, 123 Mass. 196."

³ 123 Mass. 196, 25 Am. R. 67.

customer may well be held liable for an unauthorized addition or alteration by a stranger. And that the signer of a note, complete upon its face, and not entrusted by him to any person for the purpose of being filled up or added to, but afterwards altered without his authority or assent by the insertion of additional words in blank spaces therein, should be held to have contracted with every subsequent innocent holder who may be thereby defrauded, and to be liable to him in an action on the note in its altered form is unsupported by any English decision of which we are aware, and appears to us to be inconsistent with the weight of American authority and unfounded in principle."¹

The Canadian Courts have considered *Young v. Grote*, and appear disposed to uphold it on the ground that the bankers were misled by the negligence of the drawer, and in accordance with what was pointed out by Parke, B., in his opinion to the House of Lords in *Bank of Ireland v. Trustees of Evans's Charities*. This ground, too, we have seen, has been taken by English supporters of the case. Still it by no means follows that because the customer was negligent a forgery should ensue; and this point is not grappled with by the arguments of those who support the case. The legal principle, that the customer, having misled the banker, is answerable for the consequences, is confronted with another, which holds the negligent person answerable only for the natural consequences of his negligence; of which the commission of felony, in the normal condition of things, is said in *Baxendale v. Bennett* not to be one. The question of the application of this

Canadian
Courts dis-
posed to up-
hold the case.

¹ Per Gray, C.J., 123 Mass. 196, at 202. The law in Scotland seems to have been decided otherwise. See 1 Bell, Com. (7th ed.) 416; where it is claimed that the Scottish decisions "have proceeded on the principles so well laid down by Pothier," citing *Traité du Contrat de Change*, nos. 99-101. The Scottish decisions are (1) *Grahame v. Gillespie* (1795), Mor. Dict. of Dec. 1453, where blanks having been left in a bill at the time of accepting by means of which the drawer afterwards increased the amount of the bill without giving the bill a suspicious appearance, the acceptor was held liable to an onerous indorsee for the increased value; (2) *Pagan v. Wylie* (1793), Mor. Dict. of Dec. 1660, where a bill having been fraudulently altered in consequence of a blank being left in it, all the persons whose names were upon it were held to be liable for the amount upon it. As to the authority of these decisions, see per Denniston, J., *Brown v. Bennett*, 9 N. Z. L. R. 487, at 513 (C. A.). See, also, Thomson, Bills of Exchange (Wilson's ed.) 10. *Young v. Grote* is approved in its widest interpretation in *Wallace's Trustees v. Port Glasgow Harbour Trustees*, 7 Rettie 645, at 648, where the Court says, per Lord Mure: "Where a document is forged and uttered, or otherwise made use of as a genuine document, and so as to enable a party to obtain payment of money owing to the negligence of the person whose signature is forged, the ordinary rule that a payment made upon a forged signature cannot be held to be a good payment does not, I conceive, apply, and cannot be pleaded to the prejudice of the party who has been induced to pay by means of that forged document. The law to this effect is, I think, pretty clearly laid down in the case of *Young v. Grote*." The note on Negotiable Instruments, to *Bedell v. Herring*, 11 Am. St. R. 307, at 309-326, is an exhaustive collection of cases on this subject.

² *Agricultural Savings Association v. Federal Bank*, 45 Upp. Can. Q. B. 214, 6 Upp. Can. App. 192.

latter principle is neither recognized nor disputed; but it is pointed out that in *Young v. Grote* the negligence was in "the transaction itself," and *therefore* proximate; and, if proximate, it is assumed to be actionable.¹

Brown v. Bennett.

Opinion of
Prendergast,
C.J.,

In a New Zealand case, *Brown v. Bennett*,² in which it was sought to render the maker of a promissory note liable for negligently filling it in so as to admit of alteration, *Young v. Grote* is considered, and the explanation of the decision by Prendergast, C.J., is that it was "a case between banker and customer, and was decided upon the ground of that relationship."³ The Chief Justice further doubts whether there is "a single reported case where *Young v. Grote* ⁴ has been followed, where the question arose . . . between people not holding those relative positions." "Except," the Chief Justice concludes,⁵ "in the case of banker and customer, the maker of a negotiable instrument does not owe any duty to be careful in the mode of making the complete instrument, and the maker is not, as to all who may become holders, under any obligation to anticipate and therefore to preclude the fraudulent interpolation of words or figures." "Even *Young v. Grote*," adds Williams, J.,⁶ "has been doubted, and to decide that the maker of a promissory note was under such an obligation would be going a great way beyond *Young v. Grote*." The same learned judge illustrates his view of the absence of liability of the maker of the promissory note as follows:⁷ "If a person is careless of his property, and it is stolen in consequence, and the thief sells it to an innocent purchaser, the true owner can recover it from the innocent purchaser, notwithstanding his negligence. . . . The transferee of a note runs the risk of forgery just, as the transferee of a chattel runs the risk of larceny. The transferee of the stolen chattel cannot set up the mere negligence of the true owner as an answer to an action by him to the chattel, because there is no legal duty to the public on the part of the owner to keep his own property safe from theft. So in the case of an altered promissory note, if the maker is to be charged on the ground of his negligence, the duty to take precautions against forgery must first be established." Of the correctness of this

Opinion of
Williams, J.

¹ A case in Victoria, *Bank of Australasia v. Erwin*, 1 W. W. & A'B. 90, as reported in Kerferd and Box's Victorian Digest, col. 87, is substantially the same case as *Young v. Grote*, with the difference that the document was a bill, and that the negligence was apparently due to the acceptor having weak sight, and not taking precautions to obviate its effects, whereby he was held to have made the drawer, who fraudulently altered the bill after acceptance, his agent to do so; such a ground is obviously untenable. See per Denniston, J., *Brown v. Bennett*, 9 N. Z. L. R. 487, at 514 (C. A.); also *Lea v. Graham*, 1 W. & O. (N. S. W.) S. C. 288. The weight of the American cases is on the same side. *Knoxville National Bank v. Clarke*, 33 Am. R. 129.

² 9 N. Z. L. R. (C. A.) 487.

³ 4 Bing. 253, 12 Moo. (C. P.) 484.

⁴ L. c. at 506.

⁵ L. c. at 500.

⁶ 9 N. Z. L. R. (C. A.) at 501.

⁷ L. c. at 507.

reasoning there can be no doubt, and we shall presently find that it contains the solution of the whole difficulty.

Patent Safety Gun Cotton Co. v. Wilson¹ must be noticed. Patent Safety Gun Cotton Company v. Wilson.
 To a statement of claim alleging that a cheque payable to the order of the plaintiffs was stolen from them, and the indorsement of their name forged upon it, and that it came into the possession of the defendant who converted it to his own use, the defendants pleaded that the plaintiffs knowingly employed as clerk a man who had been convicted of embezzlement and was a notorious thief; that the clerk was allowed access to the rooms where the plaintiff's letters and cheques were kept, and was empowered and permitted to receive and open the said letters and cheques, and to witness the mode in which the plaintiffs indorsed their cheques; that the clerk was frequently paid his wages by the duly indorsed cheques of the plaintiffs, and was sometimes employed by the plaintiffs to indorse cheques payable to their order; that the cheque in question was taken or stolen by the clerk, who thereupon forged the indorsement, and then procured one E., who had no notice of the forgery and theft, to cash the cheque; that the defendant received the same, with other cheques from E., without notice of the forgery and theft, and in the ordinary course of business gave full value therefor; that by their carelessness and wilful neglect in dealing with their letters and cheques the plaintiffs did not discover the forgery and theft for a considerable time; and after such discovery did not take any steps to prevent the negotiation of the cheque, and by such carelessness and neglect caused the defendant to become a *bona fide* holder for value of the cheque without notice of the forgery and theft. The plaintiff demurred to this plea. Grove, J., overruled the demurrer, which was allowed on appeal. Bramwell, L.J., had "a difficulty in dealing with the proposition that those facts afford any answer to the claim, because I am at a loss to find any reason in support of the proposition. The only answer to it is, it is not the law." Opinion of Bramwell, L.J.
 Baggallay, L.J., was of the same opinion. Brett, L.J.'s, opinion Opinion of Brett, L.J.
 was: "In point of law no negligence can justify a thief or forger; it may be taken into consideration in punishing him, but it is impossible to say that any negligence can be a justification or excuse. If so, there can be no reason why the plaintiffs should not take advantage of the fact that the cheque was stolen and forged, and recover. There is another ground upon which the plea is bad; there can be no negligence without neglect of some duty;² there was no duty here—no relation between the

¹ 49 L. J. Q. B. 713.

Ants, 9.

plaintiffs and defendant which could cause any duty to exist from the plaintiffs to the defendant."

Scholfield v.
Earl of Londe-
sborough.

Young v. Grote was much discussed in the Court of Appeal in Scholfield v. Earl of Londesborough¹ in considering the liability of an acceptor of a bill of exchange in respect of fraudulent alterations made subsequent to his acceptance.

Opinion of
Charles, J.

One Sanders drew a bill of exchange for £500 on paper bearing a £2 stamp, an amount sufficient to cover £4000, and on which there were certain blank spaces. The bill was accepted by the defendant in this condition. After acceptance the bill was handed back to Sanders who filled up the spaces and changed it into a bill for £3500. The bill was then negotiated and went through several hands till it reached the plaintiff, who sued upon it for the full amount of £3500. The action was tried before Charles, J., without a jury,² and he was of opinion,³ "that a person who signs a negotiable instrument with the intention that it shall be delivered to a series of holders, does incur a duty to those who take the bill, note, or cheque, not to be guilty of negligence with reference to the form of the instrument. If he signs it in blank, he is responsible for any amount the stamps will cover. If he signs it negligently in such a shape as to render alteration a likely result, he is responsible on the altered instrument."⁴ Notwithstanding this, the learned judge held, distinguishing Young v. Grote, that "the unaltered bill was complete in form, and, upon inspection, would not, in my judgment, have excited suspicion in the mind of a reasonably prudent man. The defendant, therefore, is not, in my opinion, liable to pay the altered bill."⁴

Three ques-
tions dis-
cussed.

On appeal three questions were discussed—first, whether the acceptor of a bill owes any duty to the subsequent holders of the bill? Second, assuming a duty from the acceptor to the subsequent holders, was the conduct of the defendant in accepting the bill in the circumstances, such as to disentitle him from setting up its alteration in material particulars as an answer to an action brought on the bill by a *bond fide* holder for value? Third, whether the forgery was not to be regarded as the proximate cause of the loss and not the negligence, so that the defendant was not liable even on the assumption of negligence?

Division of
judicial
opinion.

Lord Esher, M.R., and Rigby, L.J., were of opinion that the defendant was entitled to judgment on all three grounds. Lopes, L.J., dissented. Charles, J.'s, judgment was accordingly affirmed, though Lord Esher, M.R., and Rigby, L.J., were of opinion that

¹ (1895) 1 Q. B. 536.

² L. c. at 664.

³ (1894) 2 Q. B. 660.

⁴ L. c. at 665.

Charles, J., was wrong in holding that the acceptor of a bill owes a duty to subsequent holders; while Lopes, L.J., was of opinion that Charles, J., was right as to the duty of the acceptor, but held that the defendant by his want of care had enabled the forgery to be committed, and "wherever one of two innocent persons must suffer by the act of a third party, he who has enabled such person to occasion the loss, must sustain it;" and that the intervention of a felony did not alter the plaintiff's rights.¹

Lopes, L.J., based his opinion upon *Young v. Grote*, which he considered "very like" the present case. "No doubt" he says, "various reasons have been assigned for the conclusion arrived at. I adopt the language of Cleasby, B., in *Halifax Union v. Wheelwright*,² where he says: 'But these various reasons for the conclusion only show how incontestable the conclusion itself is; and it is perhaps only an application of one of those general principles which do not belong to the municipal law of any particular country, but which we cannot help giving effect to in the administration of justice, viz., that a man cannot complain of the consequence of his own default against a person who was misled by that default without any fault of his own.'"

Lopes, L.J., adopts the remark of Cleasby, B., on *Young v. Grote* in *Halifax Union v. Wheelwright*.

The bearing of the decision of *Scholfield v. Earl of Londesborough* on the authority of *Young v. Grote* may be best appreciated by clearing up any doubt as to the position of acceptors of bills and makers of notes with regard to subsequent parties.

Scholfield v. Earl of Londesborough considered.

(1) The broadest statement of an acceptor's duty is that expressed by Denio, J., in *Van Duzer v. Howe*,³ referring to the English cases in which it was held that a person, having a blank signature of another which he was authorized to fill up with a cheque or bill for a limited amount, and who wrote one for a larger amount, was guilty of forgery, the learned judge continues as follows: "The difficulty which the doctrine of these cases presents does not seem ever to have been urged by counsel or noticed by the Court in the civil actions brought upon such paper, though it would seem incongruous to hold that any recovery could be had upon an instrument which was in itself a forgery. The positions of the two classes of cases can only be reconciled by holding the authors of the blank signatures estopped from setting up against a *bond fide* holder, who has paid value, that the paper was not his genuine act. A fiction of nearly the same kind must be resorted to, to sustain an action in favour of the *bond fide* holder of negotiable paper which has been stolen and put in circulation by

(1) What is the position of an acceptor of a bill with regard to subsequent parties. Opinion of Denio, J., in *Van Duzer v. Howe*.

¹ (1895) 1 Q. B., at 551, 552.

² L. c. at 549.

⁴ 21 N. Y. 531.

³ L. R. 10 Ex. 183, at 192.

⁵ L. c. at 538.

the thief. Such holder must make title through a felony, and yet nothing is clearer than that an action may be maintained upon paper thus circumstanced.¹ The principle which lies at the foundation of these actions, I think, is that the maker who, by putting his paper in circulation, has invited the public to receive it of any one having it in possession with apparent title, is estopped to urge the actual defect of title against a *bonâ fide* holder."

Comment.

In the case in which this was said the defendant had delivered the bill, after accepting it, with blanks to be filled up by the drawer, which blanks he directed should not be filled in with more than a specified sum. The drawer, disregarding his instructions, filled in the blanks for a larger amount than he was authorized to fill them for. The total breadth of the learned judge's generalisation was therefore not necessary for the decision, which might be maintained on the narrowest grounds of the law of principal and agent.

Chauncey v. Arnold.

But in the subsequent case of *Chauncey v. Arnold*² the same learned judge interprets his former decision, to which he refers, by saying: "We have lately decided, in conformity with a steady course of modern decisions, that, if a man issue a bill or acceptance in blank as to date, amount, or time of credit, and it be filled up so as to create obligatory paper for any amount, and be passed into the hands of a *bonâ fide* holder, it becomes valid as against the party issuing it." The case in which this was said was that of a mortgage deed in which was a blank. The learned judge distinguishes this: "But no one would be bold enough to contend that a paper intended to operate as a mortgage could be put in circulation in such a shape, and by filling up could be made obligatory on any one. This doctrine is limited strictly to mercantile paper, and is based solely upon its negotiable quality, which gives a *bonâ fide* holder, in many instances, a better title than the original party had."

Garrard v. Haddan.

The principle stated in *Van Duzer v. Howe*³ was made the foundation of the decision in *Garrard v. Haddan*⁴ a case very similar in its facts to *Young v. Grote*. After reading the conclusion of the passage already cited from the judgment of Denio, J., Thompson, C.J., delivering the judgment of the Court, said:⁵ "The doctrine of the point is ably discussed by the learned judge, and the cases touching the subject are noticed and discussed. The doctrine is, however, but an elaboration of a great principle

Judgment of Thompson, C.J.

¹ *Peacock v. Rhodes*, 2 Doug. 633; *Miller v. Race*, 1 Burr. 452.

² 24 N. Y. 330, at 332.

⁴ 67 Pa. St. 82.

³ 21 N. Y. 531.

⁵ 67 Pa. St., at 85.

of justice, that if one by his acts, or silence, or negligence, misleads another, or in any manner affects a transaction whereby an innocent person suffers a loss, the blameable party must bear it." After discussing the cases the learned judge concludes:¹ "The authorities I have referred to hold the drawer of such a note answerable for the full face of the note as altered, to any *bona fide* holder of it for value, on the ground of the negligence of the maker in leaving the blank in the note which was thus filled up after its execution, and so we now hold, notwithstanding as between the maker and payee or other person making the alteration, it would be a forgery and void. We think this rule is necessary to facilitate the circulation of commercial paper, and at the same time increase the care of drawers and acceptors of such paper, and also of bankers, brokers, and others in taking it. This rule will not apply to cases where the alteration is apparent on the face of the paper."

This view of the law was followed by the same Court in *Zimmerman v. Rote*,² where the Court said:³ "It is the duty of the maker of the note to guard not only himself but the public against frauds and alterations by refusing to sign negotiable paper made in such a form as to admit of fraudulent practices upon them, with ease and without ready detection." It was, moreover, emphasized in *Brown v. Reed*,⁴ where Sharswood, J., delivering the opinion of the Court, said:⁵ "We mean, however, to adhere to those cases as founded both on reason and authority, and as settling a principle of the utmost importance in the law of negotiable securities. That principle is that, if the maker of a bill, note, or cheque issues it in such a condition that it may easily be altered without detection, he is liable to a *bona fide* holder who takes it in the usual course of business before maturity. The maker ought surely not to be discharged from his obligation by reason or on account of his own negligence in executing and issuing a note that invited tampering with. These cases did not decide that the maker would be bound to a *bona fide* holder on a note fraudulently altered, however skilful that alteration might be, provided that he had himself used ordinary care and precaution. He would no more be responsible upon such an altered instrument than he would upon a skilful forgery of his handwriting."

The law both in New York and Pennsylvania seems now settled on this basis, which other States have also adopted.⁶ The

¹ *L. c.* at 86.

² 75 Pa. St. 188.

⁴ 79 Pa. St. 370.

³ *L. c.* at 191.

⁵ *L. c.* at 372.

⁶ In Louisiana, for example, *Isnard v. Torres*, 10 La. Ann. 103, was decided on the authority of the principle that "where one of two innocent parties, neither of whom has

Zimmerman v. Rote.

Brown v. Reed,
judgment of
Sharswood, J.

same doctrine is, we have seen, approved by Charles, J., and Lopes, L.J.

Contrary view. The law as thus laid down is not accepted throughout the American Union, as will appear by reference to the learned judgment of Gray, C.J., in *Greenfield Savings Bank v. Stowell*,¹ where the learning on the point is collected and discussed. The learned judge refers with approbation to the reasoning of Christiancy, J., in *Holmes v. Trumper*,² and as this judgment contains a most forcible presentation of the view which negatives any duty from the acceptor of a bill to subsequent holders, it is advisable to quote from it at some length: "In all the cases (unless this is an exception) where, upon the general principle relied upon, a party has been held liable upon a written contract on the ground of negligence alone, without reference to such agency, he has only been held liable upon it in the shape in which he allowed it to go from his hands, and not as criminally altered by another." "As between the maker of commercial paper and an innocent party acting upon the faith of the paper, which the maker has voluntarily and intentionally executed and even negligently allowed to go out of his hands and get into circulation, the general principle we are discussing would preclude such maker from showing that the paper was not intended to have the effect which its appearance indicated, though, as between the original parties, many things might be shown to defeat it. It is substantially a representation upon which he has authorized innocent parties to act; and when they have thus acted he must be held by the contract indicated by the representation thus made. But this reasoning extends only to the paper as made and issued by him, or as he has thereby authorized some other person to change its terms; and, the note in this case, being a complete legal instrument when issued, to hold him bound by the contract as altered by the forgery, involves the idea that the person committing the forgery was his agent in committing it (a ludicrous absurdity), or at least that he had authorized innocent parties so to treat him." "The whole argument goes upon the assumption that the plaintiff took the note in ignorance that any alteration had been made. The argument amounts simply to this: that by the maker's awkwardness or negligence his note was issued by

acted dishonestly, must suffer, he shall suffer who by his own act occasioned the confidence and consequent injury of the others," and of *Young v. Grote*, with the passage in Pothier, *Traité du Contrat de Change*, n. 99, which refers to the liability of one drawing on a banker; see also *Johnson Harvester Company v. McLean*, 46 Am. R. 39; *Daniell, Negotiable Instruments* (4th ed.), § 1405.

¹ 123 Mass. 196.

² 7 Am. R. 664, 665, and 666. Cooley, J., concurred in this opinion, which was followed in *Burrows v. Klunk*, 70 Md. 451, 14 Am. St. R. 371.

him in a shape which rendered it somewhat easier for another person to commit a crime than if he had taken the precaution to erase the word "at," and to draw a line through the blank which followed it; and that a forgery committed by filling this blank would be less likely to excite suspicion than if committed in some other way. But how such a crime, whether committed in this or in any other way, could create a contract on the part of the maker, we confess ourselves unable to comprehend; nor are we satisfied that a forgery committed in this way would be less liable to detection than if committed in many other ways. The negligence, if such it can be called, is of the same kind as might be claimed if any man, in signing a contract, were to place his name far enough below the instrument to permit another line to be written above his name in apparent harmony with the rest of the instrument; or, as if an instrument were written with ink, the material of which would admit of easy and complete obliteration or fading out by some chemical application which would not affect the face of the paper, or by failing to fill any blank at the end of any line which might happen to end far enough from the side of the page to admit the insertion of a word. The law has no scale by which to measure the various degrees of facility with which different modes of forgery may be committed, or their liability to suspicion or detection; and we see no clear and intelligible distinction by which we could hold the maker in this case bound by this forgery, which would not hold all persons liable for the alteration and forgery of any paper signed by them. Whenever a party, in good faith, signs a complete promissory note, however awkwardly drawn, he should, we think, be equally protected from its alteration by forgery in whatever mode it may be accomplished; and unless, perhaps, when it has been committed by some one in whom he has authorized others to place confidence as acting for him, he has quite as good a right to rest upon the presumption that it will not be criminally altered, as any person has to take the paper on the presumption that it has not been; and the parties taking such paper must be considered as taking it upon their own risk, so far as the question of forgery is concerned, and as trusting to the character and credit of those from whom they receive it, and of the intermediate holders."

We have now before us a complete statement of the two conflicting views on this matter, and it only remains to ascertain for which view the balance of authority preponderates. So far back as 1684, in Marius's Advice concerning Bills of Exchange, the case of a name mended or interlined in a bill is considered,¹ and

Review of the
authorities in
Marius.

¹ At 34.

the conclusion is, that "if the bill was so mended before it was accepted" the acceptor would be bound, though to accept a bill so drawn "is an error, and justly to be reprov'd, especially in merchants." The inference seems to be that an alteration made *after* acceptance would not bind the acceptor even though negligent; for the negligence which is "justly to be reprov'd" must be joined with knowledge even where the alteration is made before acceptance.

Beawes.

With this Beawes's "*Lex Mercatoria*" agrees: ' "If a suit be commenced against the acceptor, it must be made and prosecuted in the name of him to whom the bill is made payable; for probably the drawer takes no great notice to whom it is made payable, being directed therein by the person that takes the bill; neither doth he who accepts the bill much regard the purchaser of it, but only regarding the party who drew it, with whom he corresponds, and him to whom it is made payable, to whom by his acceptance he binds himself for the payment; and so likewise where there are any assignments on bills negotiated, always the party that receives the value is directly bound to him of whom he hath received it, and the acceptor to the last assigned."

Russel v.
Langstaffe.

In 1780, in *Russel v. Langstaffe*,² Lord Mansfield said: "The indorsement on a blank note is a letter of credit for an indefinite sum."

Collis v.
Emett.

In *Collis v. Emmet*,³ A. signed his name on blank paper, which was filled up subsequently as a bill payable to a fictitious payee, and indorsed over for valuable consideration. The acceptor was held bound, since "it is in effect, and in point of law, the same thing as if they had made it payable to the person who held the bill, namely, the bearer."⁴ The liability of the acceptor is manifestly because in signing the paper he authorized the filling up of the blanks.

Master v.
Miller.

In 1791 *Master v. Miller*,⁵ was decided in the King's Bench. The question was whether an unauthorized alteration of the date of a bill of exchange after acceptance, whereby the payment would be accelerated, avoided the instrument so that no action could be afterwards brought upon it, even by an innocent holder for a valuable consideration. The King's Bench held that the bill was avoided. In the various judgments many expressions are used having an important bearing on the question of the acceptor's liability for alterations made subsequently to his acceptance.

¹ (6th ed.) 563, 564.

² 2 Doug. 514, at 516.

³ 1 H. Bl. 312.

⁴ *L. c.* per Lord Loughborough, at 321.

⁵ 4 T. R. 320, 1 Sm. L. C. (9th ed.) 825.

Grose, J., however, puts the case :¹ "Supposing a bill of exchange were drawn for £100, and after acceptance the sum was altered to £1000; it is not pretended that the acceptor shall be liable to pay the £1000; and I say that he cannot be compelled to pay the £100," according to his acceptance of the bill because it was not the same bill." The decision of the King's Bench was affirmed in the Exchequer Chamber.² In giving the judgment of the Court, Eyre, C.J., said :³ "A bill is more easily altered than a deed; if therefore Courts of Justice were not to insist on bills being strictly and faithfully kept, alterations in them highly dangerous might take place, such as the addition of a cypher in a bill for £100, by which the sum might be changed to £1000, and the holder having failed in attempting to recover the £1000 might afterwards take his chance of recovering the £100."

Case put by
Grose, J.

Eyre, C.J., in
the Exchequer
Chamber.

There is nothing here said distinguishing the case where the acceptor is negligent; and nothing to qualify the universality of the proposition that an alteration made subsequently to acceptance will not, even in the case of an innocent holder for value, avail to charge the acceptor.

Comment.

In *Swan v. North British Australasian Company*,⁴ Byles, J., says: "The object of the law-merchant, as to bills and notes made or become payable to bearer, is to secure their circulation as money; therefore honest acquisition confers title. To this despotic but necessary principle the ordinary rules of the common law are made to bend. The misapplication of a genuine signature written across a slip of stamped paper (which transaction being a forgery would in ordinary cases convey no title) may give a good title to any sum fraudulently inscribed within the limits of the stamp, and in America, where there are no stamp laws, to any sum whatever. Negligence in the maker of an instrument payable to bearer makes no difference in his liability to an honest holder for value; the instrument may be lost by the maker without his negligence, or stolen from him, still he must pay." The comment on this passage by Byles, J., himself, when it was cited in *Foster v. Mackinnon*,⁵ is: "If that be right, it can only be with reference to the case of a complete instrument; it can hardly be applicable to a case where a man's signature has been obtained by a fraudulent representation to a document which he never intended to sign." The judgment of

Dictum of
Byles, J., in
*Swan v. North
British
Australasian
Company*.

Commented on
by the same
judge in *Foster
v. Mackinnon*.

¹ 4 T. R. at 345.

² See now 45 & 46 Vict. c. 61. s. 64 subs. (1).

³ 2 H. Bl. 141.

⁴ L. c. at 143.

⁵ 2 H. & C. 175, at 184; see also *Burchfield v. Moore*, 3 E. & B. 683; and *Gardner v. Walsh*, 5 E. & B. 83.

⁶ L. R. 4 C. P. 704, at 709.

Judgment of
Byles, J., in
Foster v.
Mackinnon.

the Court in *Foster v. Mackinnon* was delivered by Byles, J. After referring to the judgment in *Swan v. North British Australasian Land Company*,¹ as establishing the proposition that "if a deed be delivered and a blank left therein be afterwards improperly filled up (at least if that be done without the grantor's negligence), it is not the deed of the grantor," the learned judge adds,² "Nevertheless, this principle, when applied to negotiable instruments, must be and is limited in its application. These instruments are not only assignable, but they form part of the currency of the country. A qualification of the general rule is necessary to protect innocent transferees for value. If, therefore, a man wrote his name across the back of a blank bill stamp, and part with it, and the paper is afterwards improperly filled up, he is liable as indorser. If he wrote it across the face of the bill, he is liable as acceptor, when the instrument has once passed into the hands of an innocent indorsee for value before maturity, and liable to the extent of any sum which the stamp will cover. In these cases, however, the party signing knows what he is doing; the indorser intended to indorse, and the acceptor intended to accept, a bill of exchange to be thereafter filled up, leaving the amount, the date, the maturity, and the other parties to the bill undetermined."

Comment.

It would seem from this that if the bill were issued as a perfected instrument, which there is no intention on the acceptor's part to have altered in any respect, that no liability will attach to the acceptor by reason of an alteration.

Lord Herschell
in *Bank of*
England v.
Vagliano
Brothers.

The dictum of Lord Herschell in *Bank of England v. Vagliano Brothers* must also be noted:³ "It is immaterial to the acceptor to whom the drawer directs him to make payment; that is a matter for the choice of the drawer alone. The acceptor is only concerned to see that he makes the payment as directed, so as to be able to charge the drawer. It is in truth only with the drawer that the acceptor deals; it is at his instance that he accepts; it is on his behalf that he pays; and it is to him that he looks either for the funds to pay with, or for reimbursement if he holds no funds of the drawer at the time of payment."

United States
Cases.

In a case depending on the interpretation of the law-merchant the opinion of the Supreme Court of the United States is of the highest value, and there are at least two cases where that opinion has been given on the point now under consideration. In *Wood v. Steele*,⁴ where an alteration was made in a promissory note after execution, Swayne, J., says:⁵ "The rules, that where

Wood v.
Steele.
Judgment of
Swayne, J.

¹ 2 H. & C. 175.

² (1891) App. Cas. 107, at 147.

³ L. R. 4 C. P., at 712.

⁴ 6 Wall. (U. S.) 80, at 81. ⁵ L. c. at 82.

one of two innocent persons must suffer, he who has put it in the power of another to do the wrong must bear the loss, and that the holder of commercial paper taken in good faith, and in the ordinary course of business, is unaffected by any latent infirmities of the security, have no application to this class of cases. The defendant could no more have prevented the alteration than he could have prevented a complete fabrication; and he had as little reason to anticipate one as the other. The law regards the security, after it is altered, as an entire forgery with respect to the parties who have not consented, and, so far as they are concerned, deals with it accordingly."

In the subsequent case of *Angle v. North-Western Mutual Life Insurance Company*,¹ Clifford, J., delivering the opinion of the Supreme Court, in the course of a most elaborate judgment said:² "Negotiable instruments are frequently delivered for use, with blanks not filled; and in respect to such instruments it is held, that where a party to such an instrument intrusts it to the custody of another for use, with blanks not filled up, whether it be to accommodate the person to whom it was intrusted, or to be used for the benefit of the signer of the same, such negotiable instrument carries on its face an implied authority to fill up the blanks necessary to perfect the same; and the rule is, that, as between such party and innocent third parties, the person to whom the instrument was so intrusted must be deemed the agent of the party who committed the instrument to his custody in filling up the blanks necessary to protect the instrument." "Where blanks exist in negotiable securities delivered to another for use, the custody of the paper, under such circumstances, gives the custodian the right to fill the blanks; but it does not confer authority to make any addition to the terms of the note; and if any such of a material character are made by such a party, without the consent of the party from whom the paper was received, it will avoid the note, even in the hands of an innocent holder."³

Angle v. North-Western Mutual Life Insurance Company.
Judgment of Clifford, J.

The conclusion from these authorities is, that acceptances of bills of exchange may be separated into two classes, the liability in respect of which is very different. The first class comprehends those acceptances where the intention of the acceptor is to issue an imperfect instrument by the leaving of blanks in it when it leaves his hand. In this class the acceptor by his signature authorizes the filling in of the blanks to the fullest extent, authorized by the stamp on the paper; and if, when the blanks are subse-

Conclusion.

¹ 92 U. S. (2 Otto) 330.

² *L. c.* at 340.

³ *L. c.* at 338.

quently filled in, the intentions of the acceptor are violated so that he is charged with a greater liability than he had any intention of undertaking, he is not allowed to escape it by showing what his instructions in fact were. The second class comprehends those acceptances where the intention of the acceptor is to issue a perfect instrument, and where the instrument as drawn would operate as a perfect instrument. In this class the liability of the acceptor is determined by the actual contract he has entered into with the drawer. In the words of Lord Herschell,¹ "the acceptor is only concerned to see that he makes the payment as directed, so as to be able to charge the drawer." Consequently, he is under no duty to intermediate holders.

(2) Was the conduct of the defendant in the circumstances such as to disentitle him from setting up the alteration.

(2) Then comes the second point discussed in *Scholfield v. Earl of Londesborough*. Assuming a duty from the acceptor to the subsequent holders, was the conduct of the defendant in accepting the bill in the circumstances—that is, with a stamp largely in excess of the value proper for a bill for £500, and with a blank space between the £ and the 500 sufficiently wide to admit of any other figure being interpolated with ease—such as to disentitle him from setting up its alteration in material particulars as an answer to an action brought on the bill by a *bond fide* holder for value.

Division of judicial opinion.

Lord Esher, M.R., and Rigby, L.J., answer this in the negative, in accordance with the opinion of Charles, J.; assuming a duty to the holder, there is in the conduct of the defendant no evidence of negligence. Lopes, L.J., takes the other view.

Is there a duty from a customer to his banker?

The correctness of this conclusion we now have to examine; and in doing so it may be well to consider whether there is a duty, and, if a duty, what that duty is in the, in some points similar, relation of customer and banker. Now, *Bank of England v. Vagliano Brothers*,² is an authority for the proposition that, as between banker and customer, such a duty exists on the part of the customer. Thus, Lord Selborne says:³ "If the plaintiffs misled the bank upon a material point, however innocently, and although they were deceived by the fraud which had been committed, I think that they, and not the bank, ought to bear the loss which has been the consequence." "It is not (as I understand) disputed that there might, as between banker and customer, be circumstances which would be an answer to the *prima facie* case, that the authority was only to pay to the order of the person named, as payee upon the bill, and that the banker can only charge the customer with payments made pursuant to

Lord Selborne's opinion in *Bank of England v. Vagliano Brothers*.

¹ *Bank of England v. Vagliano Brothers* (1891), App. Cas., at 147.

² (1891) App. Cas. 107.

³ *L. c.* at 123.

that authority. Negligence on the customer's part might be one of those circumstances; the fact that there was no real payee might be another; and I think that a representation made directly to the banker by the customer, upon a material point, untrue in fact (though believed by the person who made it to be true), and on which the banker acted by paying money which he would not otherwise have paid, ought also to be an answer to that *prima facie* case. If the bank acted upon such a representation in good faith, and according to the ordinary course of business, and a loss has in consequence occurred which would not have happened if the representation had been true, I think that is a loss which the customer, and not the bank, ought to bear."

We thus, then, attain the conclusion that, although an acceptor of a bill of exchange is under no duty to subsequent holders in respect of the manner of his acceptance, a customer of a banker is under a duty to his banker in his mode of drawing cheques on the banker. Conclusion.

If, then, in the case of customer and banker a duty exists, the next point is to determine what that duty is; for the duty alleged to attach to the acceptor of a bill is identical with that which Young *v.* Grote attributes to a customer in relation to his banker.¹ The duty was expressed by Best, C.J.,² in Young *v.* Grote, to be a duty to use proper caution in drawing the cheque, so that the banker is not misled. If a duty exists from customer to banker, what is the duty? Best, C.J., in Young *v.* Grote.

Parke, B., again brings out the duty in Bank of Ireland *v.* Trustees of Evans's Charities, when, speaking of Young *v.* Grote, he says: "In that case it was held to have been the fault of the drawer of the cheque, that he misled the banker, on whom it was drawn, by want of proper caution in the mode of drawing the cheque, which admitted of easy interpolation, and consequently that the drawer, having thus caused the banker to pay the forged cheque by his own neglect in the mode of drawing the cheque itself, could not complain of that payment." Parke, B., in Bank of Ireland *v.* Trustees of Evans's Charities.

Rigby, L.J., however, in Scholfield *v.* Earl of Londesborough,⁴ treating of the duty there alleged, says: "The duty as formulated is one not, in accepting the bill, to facilitate fraud. This is a difficult proposition to deal with. What is a duty not to facilitate fraud? If such a duty exists, it must of necessity be limited to a duty not to facilitate a particular kind of fraud." To illustrate my meaning, I may point out that any one who Rigby, L.J., in Scholfield *v.* Earl of Londesborough.

¹ Per Lopes, L.J., Scholfield *v.* Earl of Londesborough (1895), 1 Q. B. at 549.

² 4 Bing. at 259, 260.

³ 5 H. L. C. 389, at 410.

⁴ (1895), 1 Q. B. at 553.

⁵ Why? Assuming a duty of care, why is it not the same in this case as in all others—to be careful, not in regard to certain anticipated consequences, but for all

accepts a bill payable to order does in one sense an act which facilitates fraud, for any one into whose hands the bill may get can commit a forgery in regard to indorsements. There is no great difficulty in so doing, and I do not see, if the duty as formulated exists to its full extent, why it should not apply to the case I have suggested."¹

Dicta of
Rigby, L.J.,
criticized.

"This is a difficult proposition to deal with." It has been decided, and is undisputed, that where a bill is accepted in blank and negotiated, the acceptor is liable for the full amount covered by the stamp on the paper, although the filling up is effected by fraud and forgery.² Whatever the ground of this principle may be, its operation is the same as if the reason for it was the duty "not to facilitate fraud." The reason of the complementary doctrine, that where the acceptor has issued a complete instrument he is not bound, is manifestly the same as that where a man has made one contract he is not bound by another made by some one else. Yet in the case of a contract, if in making it he misleads the other party to the contract, he is estopped from avoiding any consequences reasonably and naturally flowing from his conduct if only the other party has been thereby led to act to his loss.³

There is then in ordinary cases a duty to be careful, not only "not to facilitate a particular kind of fraud," but not to facilitate any fraud which, when it has been perpetrated, is seen to have in fact flowed in natural and uninterrupted sequence from the negligent act. A duty to provide against certain consequences effected in a particular way is possible. A duty to provide against consequences however effected is certainly more usual, and much more intelligible; since a duty "not to facilitate a particular

consequences that have in fact naturally and in ordinary course followed on breach of the duty. See *Smith v. London and South Western Railway Company*, L. R. 6 C. P. 14. *Ante*, 99, and *post*, 1601.

¹ Rigby, L.J., fails to discriminate between a "cause" and an "occasion." This is, however, not the place to consider Hume's celebrated essay, *Of the idea of necessary connection*, nor to distinguish between "cause" and "antecedent." It may suffice to point out that a legal consequence must flow directly and immediately from a breach of legal duty; that between accepting a bill of exchange and accepting a bill of exchange negligently, where there is a duty to accept only carefully, there is a world of difference. Students trained in the severe principles of the common law as applied to evidence (which have been in great part adapted from the rules of the scholastic logic) will read with interest the following passage from the judgment of Rigby, L.J., at 553: "In this case we have no evidence of the circumstances under which the defendant's acceptance was obtained. This much, however, is clear, that Sanders arranged matters beforehand to enable him to commit a fraud, and it is probable that he would use means for concealing the intended fraud. I should infer that he would adopt some device for closing the defendant's eyes to the imperfection of the bill." There is a note of *Ego sum Rex Romanus et super grammaticam*, about this. See Carlyle, "Frederick the Great," vol. i. 187.

² *London and South-Western Bank v. Wentworth*, 5 Ex. D. 96.

³ *Carr v. London and North-Western Railway Company*, L. R. 10 C. P. 307, at 318.

kind of fraud," translates very nearly into a premium on a rogue's ingenuity at the expense of a fool's folly.

"What," says Rigby, L.J., "is a duty not to facilitate fraud?" Duty not to facilitate fraud. The answer has been already supplied by Parke, B., speaking for the Common Law judges in the House of Lords. In the particular case of *Young v. Grote* the duty to the banker was to draw cheques in no other manner than the way customary amongst men of business. If there were no duty from a customer to his banker, the customer might draw his cheque with whatever amount of eccentricity pleased him. As there is a duty from a banker to his customer, the banker would be constrained to honour the cheque, however drawn. Assuming the duty from the customer to his banker is to draw his cheques in the mode and with the precautions ordinarily adopted amongst men of business, his duty appears much more a duty not to facilitate fraud in respect to the instrument generally, than not "to facilitate a particular kind of fraud;" for in the event of a breach of duty being shown, whether the results flowing are particular or general in law are of no manner of moment so long as no independent force is brought into action.¹

Starting from the standpoint of a duty in respect of which the possibility of a breach is conceded, we have now to see what circumstances are evidence of negligence. If an acceptor signs in blank on stamped paper, we have already noted² that he is by the law-merchant held to have authorized the filling up of the paper, to the full value covered by the stamp. That, then, in a particular case is the measure of the acceptor's duty towards those to whose hands the paper may come. But by hypothesis, in the case we are considering, the acceptor of the bill has a duty to a particular person to accept his bill in conformity with mercantile usage. The fact that he has left blanks, and has used a stamp largely in excess of the true value of his bill, would therefore seem such a divergence from the practice of merchants as to call for explanation, or at least to suggest the application of the analogy of the acceptor's obligation where the bill is drawn in blank. If the objection is made that in that case the acceptor's obligation is by a special and exceptional rule of the law-merchant, the answer is that the case of an acceptor coming under a duty is exceptional also, and the duty to take care must be measured by what the practice of the law-merchant shows is the danger to be guarded against. This danger is of alterations in mercantile instruments, whether bills or cheques, not completed in the usual and accustomed way. If the duty to

Considerations tending to shew evidence of negligence in the circumstances of Scholfield v. Earl of Londonborough.

¹ *Ante*, 93-116. *Post*, 1601.

² *Ante*, 1591.

take care against this exists (and that it does exist is the basis of this part of the argument), it follows that there is evidence of the breach of this duty whenever a mercantile instrument is issued in an unusual way. Whether the practice of merchants has been observed would be a question for the jury.

Lord Esher,
M.R.'s, view.

Lord Esher, M.R., takes another view. He says:¹ "Suppose, however, there was a duty owing by the acceptor, it must be a duty not to accept the bill in such a form as to render a forged interpolation easy. The suggested neglect of that duty is that the acceptor ought to have anticipated that the bill would fall into the hands of a felonious person, who might take advantage of the spaces, and that the acceptor should on that anticipation have put marks on the bill to fill up the spaces. Unless it can be laid down that the mere fact of leaving such spaces unfilled is conclusive evidence of negligence, it might be that on a similar state of things different juries might take different views." That, again, would be a dangerous state of things. If, however, it is a question of fact for our decision, I am of opinion that such evidence as was given in this case is no evidence of negligence."²

Criticized.

We are still considering the matter on the assumption that there is a duty; and that the duty is, as stated by Parke, B., to use proper and ordinary caution in drawing the cheque, or in the case of *Scholfield v. Earl of Londesborough*, in accepting the bill. Yet that duty is not identical with the only duty Lord Esher, M.R., will regard as possible; it is rather a duty not to depart from the usual and accustomed way of the average business man in accepting bills. There is certainly no necessity for the acceptor to anticipate that his bill should "fall into the hands of a felonious person." His duty is to see that, into whosoever's hands his acceptance falls, it is an ordinary average business acceptance. If, not being that, and not being that through his negligence, it "falls into the hands of a felonious person," he is not to be better off, because the consequences of his negligence are more serious, than he would be if his breach of duty had merely caused trouble and

¹ (1895), 1 Q. B. at 542.

² Why not? Juries have done and do so in much more serious matters; e.g., in questions of the acceptance of goods under the Statute of Frauds, see per Lord Campbell, C.J., *Morton v. Tibbett*, 15 Q. B. 428, at 441; of the operation of a bill of lading, *Van Casteel v. Booker*, 2 Ex. 691, per Parke, B., at 709; of reasonable time in commercial contracts, *ante*, 1010; in questions of warranty, even where there is a writing, *Stacey v. Bailey*, 1 H. & C. 405; of the rate of interest on foreign bills, *Gibbs v. Fremont*, 9 Ex. 25; and, what is perhaps conclusive of the present contention, of "the usages of merchants and traders in the different departments of trade, ratified by the decisions of Courts of Law, which upon such usages being proved before them, have adopted them:" per Cockburn, C.J., delivering the judgment of the Ex. Ch. in *Goodwin v. Roberts*, L. R. 10 Ex. at 346. If the practice of drawing a mercantile instrument is not a question of mercantile usage, it is hard to find one. See also note to *Wigglesworth v. Dallison*, 1 Sm. L. C. (9th ed.), 569, at 581 *et seqq.*

³ *Ante*, 148-167.

expense in making inquiries. In this latter case he would be clearly entitled to damages. His duty is not by an act or neglect of his to increase the burden on him to whom he owes the duty. The mere leaving of blank spaces is clearly not "conclusively" negligent;¹ but if, in the opinion of a jury, it is negligence in the circumstances, it is for them to say so. If there were a statutory and inflexible form for drawing and accepting bills of exchange, the province of the jury would be excluded. The very discussion in this case shows that no form exists; and whether a mercantile instrument is drawn within permissible lines of deviation from the correct standard seems pre-eminently a question for a jury of merchants.

The conclusion therefore is that, on the assumption of a duty existing, there is evidence of the neglect of it.

(3.) Lord Esher, M.R., says: "Suppose, however, there was both a duty and negligence, the two together do not necessarily create an estoppel, because between them and the indorsement to the holder there comes in the felonious act of Sanders. That act, and not any default of the defendant, was the immediate cause of the plaintiff's loss, and so no estoppel arises against the defendant."²

(3.) Was the forgery to be regarded as the proximate cause of the loss so as to exonerate the defendant from liability even if he were negligent?

Is there, then, any such principle in English law as that "every one has a right to suppose that a crime will not be committed, and to act on that belief;"³ that where between a negligent act and the injurious consequences there intervenes a crime the injured person cannot recover in respect of his loss? The answer is, most certainly not. If there were any such general principle, *Giblin v. McMullen*⁴ would have been unarguable; for the felony there was the basis of the claim. And *In re United Service, Johnston's Claim*⁵ would have been wrongly decided; for there the Court held bankers liable, for the felony of their manager. "The bankers," says James, L.J., "were bailees for reward, and there was sufficient negligence in the performance of their duty as such bailees to render them liable for the consequences of that negligence. In both these conclusions we concur."⁶ The "consequences" had to be traced through a felony.

*Baxendale v. Bennett*⁷ has been supposed to countenance some such rule. The real decision in that case is very different. There a blank acceptance was stolen from defendant's desk, filled

Baxendale v. Bennett.

¹ *Société Générale v. Metropolitan Bank*, 21 W. R. 335.

² (1895) 1 Q. B., at 543.

³ Per Bramwell, L.J., *Baxendale v. Bennett*, 3 Q. B. Div. 525, at 530.

⁴ L. R. 2 P. C. 317.

⁵ L. R. 6 Ch. 212.

⁶ Delivering the judgment of himself and Mellish, L.J., L. C. at 217. See *ante*, 901.

⁷ 3 Q. B. Div. 525.

up, negotiated, and sued on. The Court held the defendant not liable. Apart from the felony, the acceptance would have remained in the defendant's desk. He was under no duty to the plaintiff. To constitute a duty from him to the plaintiff he must have failed in providing that the reasonable and probable consequences of his acts should not interfere with any legal right of his neighbour's. Admitting that the rights of the plaintiff were infringed, they were only affected through an act, a crime, which the defendant had a right to suppose would not be committed. Consequently, since there was no duty towards the plaintiff apart from the felony, the intervention of the felony did not put the defendant in any worse position.

Case put where a felony intervening no right of action arises.

But vary the circumstances; take the facts as in *Patent Safety Gun Cotton Company v. Wilson*,¹ and suppose that in that case the money taken was actually the property of the plaintiffs in the custody of the defendant, and stolen by the notorious thief to whom they had confided it. The case would then show a duty to take care, a neglect of that duty, a felony rendering the neglect injurious and actionable, and it cannot admit of doubt that in those circumstances the plaintiffs would have recovered.

Bank of Ireland v. Trustees of Evans's Charities.

Bank of Ireland v. Trustees of Evans's Charities,² is another alleged assertion of the principle. There the negligence alleged was in leaving the corporate seal of the Trustees of Evans's Charities in the charge of the secretary of the corporation, who without authority affixed it to five several powers of attorney, whereby the Bank of Ireland were induced to part with stock registered in the name of the trustees. The House of Lords held that the trustees were not responsible for the act of their secretary. Apart from the felony there was no obligation on the trustees to the bank to keep their seal in one place rather than in another, or in the custody of one officer in preference to the custody of another, and the felony did not create an obligation; because a legal duty extends no further than to provide against evil to one's neighbour arising from the reasonable and probable consequences of one's acts, and it is "a rule that every one has a right to suppose that a crime will not be committed, and to act on that belief."³ Hence the felony did not alter the position that existed before.

Mayor, &c., of the Staple of England v. Bank of England.

*Mayor, &c., of the Staple of England v. Bank of England*⁴ is the same case as *Bank of Ireland v. Trustees of Evans's*

¹ 49 L. J. Q. B. 713. *Ante*, 1583.

² 5 H. L. C. 389.

³ Per Bramwell, L.J., *Baxendale v. Bennett*, 3 Q. B. Div. at 530.

⁴ 21 Q. B. Div. 160.

Charities. "It is impossible to discriminate the two cases."¹

Vary the circumstances in one particular, by inserting in the charter of the trustees a clause that for the protection of the bank it shall be the duty of the trustees to keep their seal in some special custody, not the secretary's. The liability is thus established notwithstanding the felony. In the same way a man intending to give a bank-note to a friend may leave it in a public place, whence it is stolen, and the friend would be without any resort; but if the bank-note were the property of the friend, and stolen, the theft would not make the liability of the custodian any whit less than if the loss had happened from mere gross negligence.

Case where a felony intervening a right of action still arises.

The reason of all this is plainly stated in the Exchequer Chamber in *Smith v. London and South-Western Railway Company*² by Channell, B.:³ "I quite agree that where there is no direct evidence of negligence the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not;" "but when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences whether he could have foreseen them or not." In which statement of principle the rest of the Court concurred."⁴

Principle of *Smith v. London and South-Western Railway Company*.

The result, then, of this examination is:

Conclusions.

1. That the acceptor of a bill of exchange is under no duty to the subsequent holders of the bill.
2. That, assuming a duty from the acceptor to the subsequent holders in the circumstances proved in *Scholfield v. Earl of Londesborough*, those circumstances amounted to evidence of negligence.
3. That where a duty exists antecedently to the commission of a crime, the fact that a crime is committed does not affect the liability flowing from the breach of duty. On the other hand, where there is no duty existing antecedently to a crime, the fact that a crime results from lax dealing does not raise one.

It remains to consider *Young v. Grote*, which after its recognition by the Judges and the House of Lords in *Bank of Ireland v. Trustees of Evans's Charity*, the Court of Appeal was hardly competent to overrule.

Principle of *Young v. Grote*.

In *Young v. Grote* there was a duty from the customer to the banker. This duty, as explained by Parke, B.,⁴ in *Bank of Ireland*

¹ Per Fry, L.J., *l. c.* at 177.

² L. R. 6 C. P. 14.

³ *l. c.* at 21.

⁴ See particularly per Kelly, C.B., *l. c.*, at 20, and per Blackburn, J., at 21. Cp. *Halestrap v. Gregory* (1895), 1 Q. B. 561, for an illustration of the working of the principle.

⁵ 5 H. L. C., at 410.

Relation of
banker and
customer
differs from
that of acceptor
of a bill and
holder.

v. Trustees of Evans's Charities was to use ordinary and reasonable care in drawing his cheques. Through the customer's neglect of this duty the banker was misled and the decision was that the loss must be borne by the customer. If there had been no duty the case would have been the same as *Scholfield v. Earl of Lonsborough*.¹ But the relation of banker and customer is essentially different from that of acceptor of a bill and the holder. Bankers in funds are bound to pay the cheques of their customer so long as this money in their hands lasts, while no person is under any obligation to buy a bill of exchange and consequently to decide whether the paper is genuine or not. Thus a bill of exchange accepted in an unusual form can be rejected, while, if there is no duty on a customer to draw his cheques in any particular form or with any particular precaution, a cheque cannot be rejected.

The extent, then, of the principle enunciated in *Young v. Grote* is dependent on the existence of a duty, which is not constituted by any relation the acceptor of a bill of exchange bears to subsequent holders.

Controversy as
to how the
negligence in
Young v. Grote
operates.

There has been much discussion whether the negligence of the customer in *Young v. Grote* operates by way of estoppel or in some other way. Lord Esher, M.R., says that it "is not a case of estoppel at all." Parke, B.,² Lord Cranworth, C.,³ and Erle, C.J.,⁴ say that it is.⁵

Verbal
merely.

The question is after all no more than a question of words. "Estoppel," we have seen,⁶ Lindley, L.J., defines to be,⁷ "a rule of evidence which prevents a man from saying what is true." If the matter is looked at from the point of view of the customer having misled the banker, the case is one of estoppel in not allowing the customer to claim the benefit of the actual facts. If Lord Esher, M.R.,'s view is adopted, that it is a rule of the law-merchant that "any one who signs a blank cheque authorises the person in whose hands it is to fill it up as his agent," the result is in no respect different. The law-merchant cannot constitute the felon an agent; if it could, his felony would either be no felony or the acceptor an accessory before the fact to it. The law-merchant forbids the acceptor to allege that the forger was not his agent and so estops him.

Bank of
England v.
Vagliano
Brothers.

While dealing with this subject of the customer's duty to his banker, the case of *Bank of England v. Vagliano Brothers*⁸ may

¹ (1895), 1 Q. B. at 536.

² *Bank of Ireland v. Trustees of Evans's Charities*, 5 H. L. C. at 410.

³ *L. c.* at 413; *Orr v. Union Bank of Scotland*, 1 Macq. (H. L. Sc.) 513, at 522.

⁴ *Ex parte Swan*, 7 C. B. N. S. 400, at 431. ⁵ *Ante*, 1576.

⁶ *Onward Building Society v. Smithson* (1893), 1 Ch. 1, at 14.

⁷ (1891), App. Cas. 107.

⁸ *Ante*, 1565.

be noticed, as it bears on that subject. False documents were permitted to reach the bankers for payment by "the act of the customer,"¹ accompanied with a considerable number of genuine bills of exchange. The House of Lords considered that this was "a misleading of the bankers,"² and held that the bankers were entitled to debit their customer, the acceptor, with the amounts, though paid to a forger and not to the *bond fide* holder of the documents for value.

It may be noted that if the commission of a crime has the effect contended for in neutralizing negligence, the Bank of England could not have succeeded.

Ingham v. Primrose³ must also be mentioned. The Court that decided that case was composed of judges of the greatest reputation,⁴ and the judgment delivered was a considered one. The acceptor of a bill of exchange, with the intention of cancelling it, tore it into two pieces and threw them into the street. They were picked up by the indorser, joined together, and the bill was put into circulation. The acceptor was held liable, because "such negotiable instruments have, by the law-merchant, become part of the mercantile currency of the country; and, in order that this may not be impeded, it is requisite that innocent holders for value should have a right to enforce payment of them against those who by making them have caused them to be a part of such currency."⁵ Brett, L.J.'s, comment on this case, in *Baxendale v. Bennett*, is:⁶ "The correct mode of dealing with it is to say we do not agree with it." In the light of subsequent discussion the fallacy of the judgment seems very transparent in treating all instruments that may potentially become part of the mercantile currency of the country by the law merchant as having by the mere fact of their creation actually become so.

Another case, of which Brett, L.J., expresses disapproval in *Coles v. Bank of England*,⁷ is *Baxendale v. Bennett*, an action by the executors of a stockholder. The deceased, a very aged woman, was in the habit of being accompanied by her nephew, a

¹ Per Lord Halsbury, *l.c.* at 115.

² *Ibid.*

³ 7 C. B. N. S. 82.

⁴ Erle, C.J., and Williams, Willes, and Byles, J.J. In the judgment which was delivered by Williams, J., it is said, at 85: "It is, we think, settled law that if the defendant had drawn a cheque, and, before he had issued it, he had lost it, or it had been stolen from him, and it had afterwards found its way into the hands of a holder for value without notice, who had sued the defendant upon it, he would have had no answer to the action;" but see *contra* per Cockburn, C.J., *Johnson v. Credit Lyonnais Company*, 3 C. P. Div. 32, at 42. See *Bank of Ireland v. Evans's Trustees of Charities*, 5 H. L. C. 389, per Parke, B., at 410.

⁵ Per Williams, J., 7 C. B. N. S. at 85. In *Barker v. Sterne*, 9 Ex. 684, Pollock, C.B., inclines to uphold *Young v. Grote* on this ground.

⁶ 3 C. P. Div. at 532.

⁷ 10 A. & F. 437.

clerk in the bank, when she went for her dividends, for which she signed receipts both on the dividend warrant and in the bank books. The nephew must have handed over to her the full amount of dividends due, though he had in fact taken another woman to the bank, who personated the testatrix from time to time, and by forged signatures had transferred the greater part of the stock. The jury found that the deceased had been guilty of gross negligence, and that the bank had not been guilty of negligence. On motion to enter the verdict for the plaintiff the rule was discharged, on the ground that the facts found by the jury entitled the defendant to the verdict; or, as stated by the Lord Chancellor in *Bank of Ireland v. Trustees of Evans's Charities*,¹ "that the conduct of the owner of the stock, in subsequently signing from time to time receipts for reduced sums when the sums had been reduced by previous forgery, was in truth a ratification of what had previously taken place." "This," said the Lord Chancellor, "certainly seems to me to be rather a strong result."²

Negligence
must be
proximate.
*Bank of
Ireland v.
Trustees of
Evans's
Charities.*

*Bank of Ireland v. Trustees of Evans's Charities*³ has been already incidentally treated in examining the alleged principle of law that the commission of a felony by which damage results is not an actionable wrong against him whose want of care has occasioned the opportunity for committing felony. The main value of the case is that it establishes the proposition that negligence to work an estoppel must be "in, or immediately connected with," the transaction itself which is complained of. We have, therefore, to ascertain the precise import of this proposition. Plaintiffs, the trustees of the charities, alleged that they were possessed of stock; that they had not transferred it; that it was the duty of the defendants—the bank—to transfer on request; that they requested the defendants to transfer it, and that the defendants refused to make the transfer. The defendants set up a transfer under forged powers of attorney, for which they said the plaintiffs were responsible, since they allowed their secretary to have their corporate seal in his possession. The Act incorporating the trustees of the charities gave to any meeting of trustees or the majority present thereat, provided such majority should consist of three trustees at the least, power "to order and dispose of the common seal of the said corporation, and the use and application thereof." There was no evidence how far this had been acted on

¹ 5 H. L. C. 389, at 414.

² See, too, per Lord Brougham, as to the cases of *Young v. Grote* and *Coles v. Bank of England*: "I agree in what the learned judges have said upon them, and also in the doubt insinuated rather than expressed by the learned judges, and more plainly intimated by my noble and learned friend, as to how the latter case might have been determined if it had not been disposed of in the way in which it was": 5 H. L. C. at 415.

³ 5 H. L. C. 389.

beyond the fact that the secretary, the confidential officer of the trustees, had the custody of the seal, though not power to use or apply it. Further, the Bank were only empowered to register transfers or assignments if signed by the person or persons making such assignment or transfer. "Or if such person or persons be absent, by his, her, or their attorney or attorneys thereunto lawfully authorized in writing, under his, her, or their hand and seal, or hands and seals to be attested by two or more credible witnesses."¹ The transfer could not therefore be made by merely impressing the seal; besides this, the signature of the witnesses was necessary.²

In delivering the opinion of the judges to the House of Lords, affirming the judgment of the Irish Exchequer Chamber, Parke, B., drew a distinction between direct and remote negligence. Direct negligence is that which itself by natural operation is productive of injury. Remote or indirect negligence must operate by the intervention of some new cause. Where the course that events follow is a result that is seen to have flowed in ordinary course from the particular negligence in the case, then the negligent person is liable to answer for the neglect; where the result is not "the necessary, or ordinary, or likely result of that negligence,"³ then, according to the general principle of law, the loss must lie where it falls.⁴ In the case before the House, "the negligence in the custody of the seal was very remotely connected with the act of transfer. The transfer was not the necessary or ordinary or likely result of that negligence. It never would have been, but for the occurrence of a *very extraordinary event, that persons should be found either so dishonest or so careless as to testify on the face of the instrument that they had seen the seal duly affixed.*"⁵

In considering this case it is apparent that the difficulties to be got over by the bank were numerous. To establish any defence they had to shew, first, negligence of the trustee; secondly, damage flowing therefrom in natural and ordinary course. Negligence, however, is dependent on duty.⁶ The negligence alleged was in not taking more care in the custody of their seal.

¹ 37 Geo. III. c. 54 s. 6 (Irish Statutes).

² For valuable information as to seals and sealing, see 4 Kent Comm. (12th ed.) 451, n. (e), and 452-455; also Shep. Touch. (Preston's ed.) 57; Com. Dig. Fait (A 2), Sealing. There is a curious passage in Fleta with regard to negligence in the custody of a seal. After suggesting various defences to actions on a deed, it concludes: "*Dum tamen nihil sit quod imperitiae vel negligentiae suae possit imputari ut sigillum suum senescallo tradiderit vel uxori quod cautius debuit custodivisse in quibus casibus oportebit vocantem docere contrarium, et tunc fiant inquisitiones per talia brevia*": Lib. 6, c. 33, sec. 2. Cp. Hibblewhite v. M'Morine, 6 M. & W. 200.

³ 5 H. L. C. at 410.

⁴ Ante, 796.

⁵ Per Parke, B., 5 H. L. C. at 410. No adequate study of this case can be had without reading the judgments delivered in the Irish Exchequer Chamber, 3 Ir. C. L. R. 280.

⁶ See per Lord Esher, M.R., *Le Lievre v. Gould* (1893), 1 Q. B. 491, at 497.

Parke, B.'s distinction between direct and remote negligence.

Bank of Ireland v. Trustees of Evans's Charities considered.

If the trustees were in the position of a private person, as Parke, B., points out,¹ a similar duty must exist to safeguard a cheque-book, to lock up the desk in which it is kept, or to be so answerable for his goods that if "a servant took them and sold them he must be considered as having concurred in the sale." The trustees, however, were a corporation with statutory duties, among which it does not appear to have been alleged there was any in this respect that the bank could call on them to perform. Moreover, they had done nothing beyond leaving their seal in the custody of their confidential officer. This they were empowered to do, observing certain formalities.² Had they done so with the formalities the same results would have followed. Yet the trustees would have been justified. At worst their act would have been an exercise of a discretionary power attended with unhappy results. If the formalities were not observed, the neglect of them, assuming the bank's right to complain, could have no connection with the forgery. The case then would involve the same principle as that illustrated by *Sharp v. Powell*.³ Secondly, on the assumption that there was a duty on the part of the trustees to keep the seal out of the possession of the secretary,⁴ an equal difficulty existed. The custody of the seal alone would not enable a fraud to be committed, even granted there was also a duty on the trustees to anticipate a fraud. The plaintiffs were entitled to anticipate that the "two or more credible witnesses," who were required to attest the transfer, would perform their duty faithfully, and that even if they did not, the bank would "look to and see a true and genuine authority for a transfer."⁵ The wrongful act of the trustees, if there were a wrongful act of which the bank could avail themselves, could then only become effectual through a default in duty of some person over whose actions the trustees had no control and on whose right action they were therefore entitled to count. Such default accordingly rendered the previous negligence of the plaintiffs remote and not actionable.⁶

Merchants of
the Staple of
England v.
Bank of
England.

*Merchants of the Staple of England v. Bank of England*⁷ was

¹ 5 H. L. C. at 410.

² See per Crampton, J., in the Irish Queen's Bench, 12 Ir. L. B. 365, at 396.

³ L. R. 7 C. P. 253. See *ante*, 104.

⁴ See 3 Ir. C. L. R. 280, per Ball, J., at 315, per Crampton, J., at 335, and per Monahan, C.J., at 374.

⁵ Per Perrin, J., *l. c.* at 323.

⁶ *Ante*, 73.

⁷ 21 Q. B. Div. 160. See also *In re Cooper*, *Cooper v. Vesey*, 20 Ch. D. 611, at 634; *Patent Safety Gun Cotton Company v. Wilson*, 49 L. J. C. P. 713 (C. A.), per Brett, L.J., at 715: "In point of law no negligence can justify a thief or forger." See also the remarks of Lord Field, *Bank of England v. Vagliano Brothers* (1891), App. Cas. 107, at 169. In Canada the same principle is recognized in *Agricultural Savings Association v. Federal Bank*, 6 Upp. Can. App. 192; and in *Saderquist v. Ontario Bank*, 15 Ont. App. 609, where an ignorant man, a foreigner, deposited money with the defendants, and received a non-negotiable deposit receipt for the amount. The depositor's signature

decided on the authority of *Bank of Ireland v. Trustees of Evans's Charities*. An attempt was made to discriminate the case by drawing attention to Parke, B.'s, reference to the fact that the attestation of the transfer in *Bank of Ireland v. Trustees of Evans's Charities* asserted that the sealing and delivery was had in the presence of the witnesses by the successive chairmen of the company. Fry, L.J., considered this to be immaterial: "It appears to me that the attestation, so far as it referred to the presence of the chairman, was immaterial. The terms of the statute which required the attestation did not require that it shall be executed in the presence of the chairman at all, and therefore I cannot help concluding that it is really an immaterial matter, though, no doubt, the fact that certain persons so certified is evidence of their carelessness."

Yet surely this very fact of the carelessness of certain persons is vital. Assuming actionable negligence and an uninterrupted course of events subsequent to the negligence, if the view presented here is correct, it would be difficult to avoid the conclusion that the person guilty of the negligence was responsible for the consequences. Where the sequence of consequences fails is where a duty of care has to be exercised by third persons, The presumption is that they will do their duties. Thus everything subsequent to the time when they are bound to intervene can only indirectly and remotely be referred to previous agents, whose action in law then becomes irresponsible action.² The true ground of the likeness of this case to *Bank of Ireland v. Trustees of Evans's Charities* is that in neither case was there any legal duty on the plaintiffs to do some further act which they had not done. Any duty that existed was a duty not to mislead.³ The plaintiffs did nothing, represented nothing, and mere laxity in the custody of the seal alone would not enable a transfer of stock to be effected.

*Arnold v. Cheque Bank*⁴ illustrates the principle laid down in *Bank of Ireland v. Trustees of Evans's Charities*. An action was brought to recover the proceeds of a draft of £1000, upon the ground that it was received by the defendants in circumstances

was left with defendants for identification. Defendants, however, paid to a person presenting the note without identification. From the time of payment, in April, to December, nothing was done. In December the plaintiff employed a solicitor, who did nothing. In April he consulted another; a demand on the bank was then made, and this was the first intimation of the fraud practised on them. The Court held there was no legal duty cast on the plaintiff to notify the fraud to defendants, and thus an essential element to estoppel by conduct was absent from their case. See *Shipman v. Bank of State of New York*, 126 N. Y. 318, 22 Am. St. R. 821.

¹ 21 Q. B. Div. at 177.

² *Ante*, 59.

³ Per Parke, B., 5 H. L. C. at 410.

⁴ 1 C. P. Div. 578. See *Kleinwort, Sons & Co. v. Comptoir Nationale d'Escompte de Paris* (1894), 2 Q. B. 157.

which made it money received to the use of the plaintiffs, who were merchants in New York, and desired to transmit the draft in question to Bradford. To this end the draft was specially indorsed, and inclosed in a letter for England. It was stolen during transit, an indorsement forged, and was ultimately paid by the defendants. The plaintiffs sought to recover the money thus paid. Payment was resisted by the defendants on the ground that the plaintiffs had been negligent in the transmission of the draft; and to prove this they tendered evidence to shew "an usual or almost invariable practice of sending, besides the letter containing the draft, a letter of advice by the same or another ship."¹ This was rejected, and in the result a verdict was directed for the plaintiffs. An order *nisi* for a new trial, on the ground of the rejection of evidence of the plaintiffs' neglect of the ordinary usage of merchants, and that the plaintiffs were precluded from recovering by neglect of proper precautions in the custody and dispatch of the draft, was discharged; the Common Pleas Division being of opinion that the plaintiffs could not be guilty of negligence in relying on the honesty of their servants in the discharge of their ordinary duty of conveying letters to the post, and that there was not any duty to the general public to exercise the same care in transmission of the draft as if any or every servant employed was a notorious thief.² As to the duty of sending a separate letter of advice with it, "which would entail upon the senders of cheques new and unheard-of responsibilities," the Court held that "this duty would be collateral to the indorsing and forwarding of the draft, and the omission of it could in no sense be considered as the proximate cause of the larceny and forgery which have occurred."³

Stock handed over on forged order. Which of two innocent persons is to be loser.

Akin to the cases we have considered is the case of stock or funds handed over by a banker under a forged order to an innocent purchaser from the forger. The question then arises: Who is to suffer loss—the rightful owner, the banker, or the innocent assignee?

Hildyard v. South Sea Company and Keate

The earliest decision on the point dates so far back as 1722. In *Hildyard v. South Sea Company and Keate*,⁴ South Sea stock of the plaintiff was transferred on the authority of a forged letter

¹ 1 C. P. Div. at 584.

² See per Fry, L.J., *Fine Art Society v. Union Bank of London*, 17 Q. B. Div. 705, at 713; also *McEntire v. Potter*, 22 Q. B. D. 438; *Belknap v. National Bank of North America*, 100 Mass. 376.

³ 1 C. P. Div. at 590. Cp. *Vagliano Brothers v. Bank of England*, 22 Q. B. D. 103, at 122, affirmed in Court of Appeal, 23 Q. B. Div. 243, reversed in the H. of L. (1891), App. Cas. 107.

⁴ 2 P. Wms. 76; cp. *Harrison and Pryse's Case* (1740), *Barnard*. (Ch.) 324, which Best, C.J., in *Davis v. Bank of England*, 2 Bing. at 406, considers "not correctly reported by *Barnardiston*," and refers to 2 Atk. 120, where it appears *sub nom.* *Harrison v. Harrison*.

of attorney to the defendant Keate. On the plaintiff claiming restitution, it was held by Sir Joseph Jekyll that "a forged letter of attorney was, as to him, the same as no letter of attorney; consequently his stock, which has been transferred from him without any authority at all, ought to be restored to him." The decision further was that Keate, and not the company, was to restore the stock, and also to pay back the dividend which he had received, as well as pay to the plaintiff and the company their costs; "and it would be of public use that those who accept of a transfer of stock under a letter of attorney should be obliged to take strict care of the validity and reality of such letter of attorney, for no other person can be so properly concerned to do it."

In *Ashby v. Blackwell*,¹ Lord Chancellor Northington declined to follow this decision, and decided that "a trustee, whether a private person or body corporate, must see to the reality of the authority empowering them to dispose of the trust money; for if the transfer is made without the authority of the owner the act is a nullity, and in consideration of law and equity the rights remain as before." As to *Hildyard v. South Sea Company* and *Keate*, the Lord Chancellor "differed both from the decision and the reasoning of that case."² "I think," he said, "it was not incumbent upon Blackwell to inquire into the letter of attorney, because I think the letter of attorney in this and similar cases is no part of the purchaser's title. The title is the admission into the company as a partner *pro tanto*, he accepting the stock on the conditions of the partnership. The letter of attorney is only the authority of the company to transfer. In fact, they have so considered it, for they have made regulations to prevent frauds in letters of attorney, which, they now insist, concerned not them, but the purchaser, which is repugnant. . . . On the other hand, they (the company) must and ought to answer for their and their servants' negligence."

not followed
by Lord
Chancellor
Northington
Ashby v.
Blackwell.

A similar point came before the Common Pleas in *Davis v. Bank of England*.³ The judgment of Best, C.J., is very full and worthy of study.⁴ In the course of it he said:⁵ "It is

Davis v. Bank
of England.
Judgment of
Best, C.J.

¹ (1765), 2 Eden 299, at 302, Ambler 503.

² *L. c.* at 302.

³ (1824), 2 Bing. 393. This case was much considered by the Irish Judges in the *Ex. Ch. in Bank of Ireland v. Trustees of Evans's Charities*, 3 Ir. C. L. R. 280, at 303, 319, 336, 340, 342, 352, 373, 379. *Coles v. Bank of England*, 10 A. & E. 437, has been noticed already. *Stone v. Marsh*, 6 B. & C. 551, *Hume v. Bolland, Ry. & Moo.* 371, *Ex parte Bolland*, In the matter of *Marsh, Mont. & Mac.* 315,—all dealing with Fautleroy's forgeries, are authorities for the position that the *cestui que trust* may recover against the innocent trustees, and is not compelled to seek restitution from the banker.

⁴ See per Kay, J., *Barton v. North Staffordshire Railway Company*, 38 Ch. D. 458, at 464.

⁵ 2 Bing. at 407.

the duty of the bank to prevent the entry of a transfer until they are satisfied that the person who claims to be allowed to make it is duly authorized to do so. They may take reasonable time to make enquiries, and require proof that the signature to a power of attorney is the writing of the person whose signature it purports to be. It is the bank, therefore, and not the stockholder, who is to suffer, if *for want of enquiring*—and it does not appear that any enquiry was made in this case—they are imposed upon, and allow a transfer to be entered in their books, made without a proper authority.” “But,¹ to prevent as far as we can the alarm which an argument urged on behalf of the bank is likely to excite, we will say that the bank cannot refuse to pay the dividends to subsequent purchasers of these stocks. If the bank should say to such subsequent purchasers, ‘The persons of whom you bought were not legally possessed of the stocks they sold you,’ the answer would be: ‘The bank, in the books which the law requires them to keep, and for the keeping which they receive a remuneration from the public, have registered these persons as the owners of these stocks, and the bank cannot be permitted to say that such persons were not the owners.’” “We agree² with the counsel for the bank, that if it had appeared that the bank had paid these dividends to persons to whom (if the plaintiff had informed them of the forgeries as he ought to have done on the 5th March, 1820) they could have refused to pay them, he cannot recover such dividends in this action. We say, in the language of Lord Mansfield in *Bird v. Randal*,³ ‘That whatever will in equity and conscience, according to the circumstances of the case, bar the plaintiff’s recovery, may be given in evidence by the defendant, because the plaintiff must recover upon the justice and conscience of his own case, and on that only.’” “It is not enough for the defendants to say that they might have paid these dividends to other persons; to defend the action on the principle laid down by Lord Mansfield they must prove that they have paid them to persons to whom they could have refused to pay them had they been informed of the forgeries.” “This case⁴ was put to us in argument. A. knowing that B. had forged A.’s name to a draft on his banker, sees B. come out of the banker’s shop with the money obtained by the forgery, and neither arrests B. nor gives any information to the banker. Could A. recover this money again from the banker? A jury in such a case must find that A. was privy to the forgery at the time it was committed, and would, I think, infer that A. assented to it, and such

¹ *L. c.* at 407.

³ 3 Burr. 1345, at 1353.

² *L. c.* at 409.

⁴ 2 Bing. at 411.

finding would prevent his recovering in an action against the banker."¹

The judgment of the Common Pleas was reversed upon writ of error by the King's Bench,² on what Shadwell, V.C., in *Sloman v. Bank of England*,³ describes as the "singular ground" that it could not be the duty of the bank to pay the dividends until they had received them from Government, and on the ground that "there is no allegation in the declaration that the bank ever had received the dividends from Government, nor is there any fact found by the jury to cure the want of that allegation."⁴ As to this the remark of Shadwell, V.C., appears eminently just: "It seems to me that every Court of Law ought to take it for granted that that which the Legislature says shall be done has been done."⁵ The principles laid down by Best, C.J., were not impugned, and have frequently been referred to in subsequent cases as rightly setting forth the law.

In *Sloman v. Bank of England*⁶ a curious complication arose, and caused the suit to be prosecuted in Chancery. One of two trustees of a sum of stock sold it out under a power of attorney to which he had forged the signature of his co-trustee, and subsequently absconded. The bank refused to replace the stock, and the plaintiffs were advised that as the stock was standing in the joint names of the trustees, one alone could not bring an action at law against the bank. The Vice-Chancellor held that a Court of Equity would compel the bank to reinvest the stock in the name of the other trustee, adding:⁷ "Upon the mere restitution of the stock a right would accrue to" the holder "to receive the dividends from the time when the stock was abstracted."

*Midland Railway Company v. Taylor*⁸ was argued on a subtle distinction between its facts and those which existed in *Sloman v. Bank of England*. It was contended that in that case the defrauded trustee was alive, and his legal rights complete and enforceable, while in the present case the defrauded trustee had died, so that his right of action was altogether gone, and the other trustee, who had transferred the stock by deed, forging his co-trustee's name, had himself duly executed the deed of transfer. The argument was thus summed up: "All that the appellants did was to act on a deed which, as to them, was a lawful authority for the transfer, but if not so at that time, was so afterwards, for

¹ Cp. *M'Kenzie v. British Linen Company*, 6 App. Cas. 82, per Lord Blackburn, at 100.

² 5 B. & C. 185.

³ 5 B. & C. at 187.

⁴ 14 Sim. 475.

⁵ (1860), 28 Beav. 287, 8 H. L. C. 751

⁶ (1845), 14 Sim. 475, at 486.

⁷ 14 Sim. at 486.

⁸ L. c. at 492.

Judgment of
Common Pleas
reversed by the
King's Bench.

*Sloman v. Bank
of England.*

*Midland
Railway
Company v.
Taylor.*

Bright, becoming the survivor of the two partners, became the *dominus* of the stock."¹ This argument did not prevail either with the Master of the Rolls or in the House of Lords, whither the case was carried (after enrolment). Lord Chancellor Westbury was particularly emphatic: "There can be no possible doubt that there is a title in that personal representative (of the defrauded trustee) to call on the company to replace the stock. . . . It is impossible to say that the right, which existed at the time when the forged transfer was made, is taken away and lost by the accidental circumstance of Taylor subsequently dying in the lifetime of Bright."

Conclusion.

The law appears clearly established in the course marked out by these decisions. No one is to be deprived of his property without his assent; and property wrongfully transferred or stolen should be restored to the rightful owner. On the presentation to a banker or a trustee of funds of a certificate for transfer, the most scrutinizing enquiries must be made, and the parties required to transfer must act upon their own responsibility. If misled, though wholly without fault, they must suffer, and their loss can only be shifted, where the act of the true owner has brought about the state of things which has induced them to part with possession.²

Telegraph
Company v.
Davenport.
Headnote con-
sidered.

A United States case on this subject, *Telegraph Company v. Davenport*,³ may with advantage be referred to, and is wholly in accord with the English decisions. The headnote is, however, somewhat misleading, and certainly not borne out by the judgment in the case. "The negligence of their guardian," it is laid down, "cannot preclude minors from asserting by suit their right to stock belonging to them," which was sold and transferred through alleged negligence of the guardian. If the stock was in the minors' names the fact of minority is irrelevant, and a transfer in fraud of them would be inoperative wholly irrespective of their minority. If the stock were not in the minors' names but in the guardian's, and the proper formal authority were given to the bank by the guardian, the fact of the minor having a trust interest in the property, not disclosed to the bank, would not affect the bank with greater liability than in an ordinary case.

Facts of the
case.

But a reference to the case itself will shew that the point decided was nothing of the sort. It was contended that "the mother of the plaintiffs, as their guardian, was chargeable with culpable negligence in the keeping of the certificates, and therefore that the plaintiffs are estopped from claiming

¹ 8 H. L. C. at 754.

² *Swan v. North British Australasian Company*, 7 H. & N. 603, 2 H. & C. 175.

³ 97 U. S. (7 Otto), 369.

them or their value from the company."¹ It is plain that the question of majority or minority has nothing essentially to do with the case. The argument was no more than the old familiar one we have traced through a series of cases, that the plaintiffs, or some one identified with them, have been negligent, and therefore our negligence should be excused. The Court met it by saying: Judgment of the Court.
 "We do not think it at all necessary to comment at any length upon this singular position; for even if it were possible, as it is not, to preclude the minor heirs from asserting their rights to property received from their father" (it thus appears that the stock was in their names, and this is definitely so stated in the case),² "by reason of any negligence of their guardian,³ we are unable to perceive any necessary connexion between" the negligence alleged and the results accrued.

The decision, it is therefore apparent, does not bear at all on Comment.
 the question of whether a trustee guardian for infants can prejudice their position by dealing with funds vested in the trustee's name. On general principles it is clear that in such a case infants are not specially protected.⁴

The case of *Ashbury Railway Carriage and Iron Company v. Riche*,⁵ has also been invoked for the protection of companies where they have certified transfers that ultimately prove forged. It has been argued on their behalf that there can be no remedy for the non-issue of stock, which a company has no power to issue; for the effect of allowing damages where there is no power to contract would be to extend the powers of a company, and do away with the limitation on their issue of shares. The answer to this contention was given in *Balkis Consolidated Company v. Tomkinson*,⁶ where Lord Herschell, C., says: "A person to whom the company is liable by estoppel to pay damages for refusing to register his transfer does not by reason thereof become a shareholder. Indeed the very title by estoppel implies that he is not one. It has never been laid down, and is manifestly not the law, that a company is not authorized to employ its funds in paying damages for a wrong done, and if his right by estoppel is established, the company have as much committed a wrong by refusing to register as shareholder the person whose title they deny as if his title to be registered had in fact been a good one." Ashbury Railway Carriage and Iron Company v. Riche.

Balkis Consolidated Company v. Tomkinson.

¹ *L. c.*, at 372.

² *Cp. ante*, 199.

³ 97 U. S. (7 Otto.), at 370, "in whose [the children's] names, respectively, they were entered on the books of the company, and to whom separate certificates were issued."

⁴ *Ante*, 1492. 54 & 55 Vict. c. 43, and 55 & 56 Vict. c. 36, are Acts for preserving purchasers of stock from losses by forged transfer, and provides for payment of compensation for losses sustained from a transfer of securities brought about for forgery.

⁵ *L. R.* 7 H. L. 653.

⁶ (1893), *App. Cas.* 396, at 407.

Distinction
between
negotiable and
not negotiable
instruments.

The distinction between instruments that are negotiable, or are treated in such a way as to hold out to third persons that they are negotiable, and instruments that are in their nature not negotiable, may now be noted more in detail.

x. Where an
instrument is
not negotiable.

1. If an instrument is not negotiable, no right of action can be transferred by delivery; unless there is a representation on the face of the instrument made by the person in whom the title would be apart from such representation—that it would pass with a good title to any one taking it in good faith and for value—which representation has induced others to alter their position on the faith thereof.¹ This is so even where the conduct of the owner has enabled a fraud to be perpetrated and has caused loss; if, that is, such conduct is in the ordinary course of business, and there is no neglect of duty either to individuals or to the public; as in *Fine Art Society v. Union Bank of London*.²

*Fine Art
Society v.
Union Bank of
London.*

In that case plaintiffs brought an action for wrongful conversion of certain post-office orders which they had handed to a clerk to pay in to their account at the defendants' bank, where also, unknown to them, the clerk had an account. The clerk paid the orders to his own account, and the bank presented the orders to the post-office, received the money for them, and placed it to his credit. If the post-office orders were not negotiable, the defendants were clearly liable, since the property of the plaintiffs would then not have been divested. The ordinary practice with post-office orders was proved to be for the payee to sign a receipt in the form appearing on the order. In the case of orders presented for payment by a banker a regulation permitted payment without the signature, by the payee, of the receipt contained in the order, provided the name of the banker presenting the order was written or stamped on it. The contention was that the effect of this was to make a post-office order an instrument which passed by delivery amongst all persons having banking accounts. The Court of Appeal held otherwise, considering that the effect was merely "to make the signature of the banker a substitute for the signature to the receipt of the original payee."³ To the suggestion that the conduct of the plaintiffs in trusting the orders to a clerk to pay in, estopped them from setting up their legal title, it was answered⁴ that there was "no neglect of any duty which the plaintiffs owed to the defendants or to the general public, and in fact there was no

¹ *Goodwin v. Roberts*, 1 App. Cas. 476, per Lord Cairns, C., at 489; *Colonial Bank v. Cady and Williams*, 15 App. Cas. 267; *Bentinck v. London Joint Stock Bank* (1893), 2 Ch. 120.

² 17 Q. B. Div. 705.

³ Per Fry, L.J., delivering the judgment of himself and Bowen, L.J., *l. c.* at 713.

⁴ *Ibid.*

negligence at all; for the plaintiffs could not, and if they could, they were not bound themselves to carry the post-office orders to the bank, and they were therefore acting reasonably and prudently in entrusting the orders to the care and custody of "their servant; and by this reasonable conduct they cannot be estopped from asserting their legal claim to the proceeds of the orders."

2. Where an instrument is negotiable a holder for value without notice is entitled to recover against a person who has signed his name to it and delivered it to be negotiated, although the person to whom the blank paper is given may have defrauded the man who gave it to him.¹ This is only where the instrument is filled up. For it has been held that if one without inquiry takes an instrument signed in blank by a third party, and fills up the blanks, he cannot, even in the case of a negotiable instrument, claim the benefit of being a purchaser for value without notice, so as to acquire a greater right than the person from whom he himself received the instrument.²

(2) Where an instrument is negotiable.

The rule of law, says Parke, B.,³ "was long considered as being firmly established, that the holder of bills of exchange indorsed in blank, or other negotiable securities transferable by delivery, could give a title which he himself did not possess to a *bond fide* holder for value." This rule, which Parke, B., speaks of as at least jeopardized at the time when he was considering it,⁴ has since been completely re-established,⁵ and it is now undoubted law that negligence does not invalidate the title of a person taking a negotiable instrument (1) in good faith, and (2) for value.

Rule stated by Parke, B.

¹ London and South-Western Bank v. Wentworth, 5 Ex. D. 96. As to what are negotiable instruments, see *ante* 1541.

² France v. Clark, 26 Ch. Div. 257; Powell v. London and Provincial Bank (1893), 2 Ch. 555, where the requirements of sec. 14 of 8 & 9 Vict. c. 16, that deeds of transfer shall be "duly stamped," and the consideration "truly stated" therein, are held merely directory; and it is determined non-compliance with them does not invalidate an instrument otherwise regular. See Fox v. Martin, W. N. 1895, 36.

³ Foster v. Pearson, 1 Cr. M. & R. 849, at 855.

⁴ He was referring to "the rule first laid down by the Court of Common Pleas in the case of Snow v. Peacock, 11 Moo. (C. P.) 286, 3 Bing. 406, and which was founded upon the dicta rather than the decision of the judges of the King's Bench in the case of Gill v. Cubitt." Gill v. Cubitt, 3 B. & C. 466, is overruled as an authority on the transfer of negotiable securities by Raphael v. Bank of England, 17 C. B. 161. This last case establishes that a person who takes a negotiable instrument *bond fide* for value has undoubtedly a good title, and is not affected by the want of title of the party from whom he takes it. His having the means of knowing that the security has been lost or stolen, and neglecting to avail himself thereof, may indeed amount to negligence, yet will not disentitle him to recover. As to "means of knowledge," see Kelly v. Solari, 9 M. & W. 54, where what is sufficient to preclude recovery for money paid under a mistake in fact is considered. *Ante*, 1543.

⁵ By 45 & 46 Vict. c. 61. s. 90., London Joint Stock Bank v. Simmons (1892), App. Cas. 201. Many of the American States have adopted the rule that if a negotiable instrument—a cheque or draft—upon which the name of a prior indorser has been forged, is paid, the amount may be recovered back from the party to whom it has been paid, or from any party who indorsed it subsequent to the forgery. People's Bank v. Franklin Bank, 17 Am. St. R. 884, and long note, at 889.

Negotiable paper presumed to be issued clear of all blemishes.

The maker of negotiable paper is always presumed, in the absence of evidence, to have issued it clear of all blemishes or alterations. The burden of showing that it was defective when issued is on the holder. "He who takes a blemished bill or note takes it with all its imperfections on its head. He becomes sponsor for them, and though he acts honestly, he acts negligently. But the law presumes against negligence as a degree of culpability; and it presumes that he [the holder] had not only satisfied himself of the innocency of the transaction, but that he had provided himself with the proofs of it, to meet a "scrutiny he had reason to suspect."¹

Negotiable instrument when issued becomes a portion of the currency.

This is on the principle that by the law-merchant a negotiable instrument when issued becomes a portion of the currency, and the person who issues it is bound to make good the representation he authorizes. It may be urged, in alleged conformity with cases already discussed,² that this principle does not extend to authorize dealings that can exist only through the perpetration of crimes. On consideration, however, even admitting the existence of the principle, a difference is apparent between a case like *Young v. Grote* and the present case. There the cheque, though negligently filled up, was yet a perfect instrument, and there was no authority to alter it. In the present case the maker signed his name and delivered the paper for the purpose of being filled up within certain limits indicated by the stamp, and, upon its being filled up in a manner apparently warranted by the maker's dealings with it, whether he was defrauded or not became in law immaterial; otherwise, private instructions would control legal relations created by the maker's act.

The acceptor of a bill is in no better position if he signs before the drawer's name is inserted than if he signs after; and if he signs after he will be bound, by virtue of the third proposition in *Carr v. London and North-Western Railway Company*.³ The case has been put in another way; whether there is crime or not in the filling up of the instrument, is immaterial, and therefore inadmissible, since the act of the acceptor has given authority to fill up the instrument in the way in which apparently it has been filled up. Any such proposition is nevertheless logically inadmissible; for the acceptor has never given any such authority, and the law does not say that he has given authority. It merely refuses to take cognisance of anything else than is

¹ *Estate of Nagle*, 134 Pa. St. 31 at 44, 19 Am. St. R. 669, adopting the language of *Gibson, C.J.*, in *Simpson v. Stackhouse*, 9 Pa. St. 186, at 187.

² *Ante*, 1578 and 1599.

³ L. R. 10 C. P. 307.

apparent on the paper the acceptor has issued, where the acceptor is sued upon it.¹

In an old American case a similar point was discussed.² A American decision. merchant entrusted his clerk with blank indorsements which were obtained from the clerk by false pretences, and negotiated. In an action to obtain payment from the indorser the merchant was held liable. "If," says Parsons, C.J.,³ "the clerk had fraudulently and Judgment of Parsons, C.J. for his own benefit made use of all the indorsements for making promissory notes to charge the indorsers, we are of opinion that this use, though a gross fraud, would not be in law a forgery, but a breach of trust. And, for the same reason, when one of these indorsements was delivered by the clerk, who had the custody of them, to the promiser, who by false pretences had obtained it, the fraudulent use of it would not be a forgery; because it was delivered with the intention that a note should be written on the face of the paper by the promiser, for the purpose of negotiating it, as indorsed in blank by the house. And we must consider a delivery by the clerk who was entrusted with a power of using these indorsements (although his discretion was confined) as a delivery by one of the house, whether he was deceived, as in the present case, or had voluntarily exceeded his direction. For the limitation imposed on his discretion was not known to any but to himself and to his principals." The conclusion was, that since Conclusion. one of two innocent persons must suffer, it was expedient in the interests of the mercantile community at large that an additional burden should be placed on those issuing blank paper, rather than that the confidence in all mercantile instruments should be shaken.

Where, for the purpose of avoiding the detection of a fraud, In commercial matters the State bound by ordinary rules. agents of the Government of the United States who were guilty of the fraud appropriated to the use of the Government, the property of an innocent person, knowing when they did so that the property was such person's, and not the State's, it was held that repayment of the sum appropriated must be made.⁴ A distinction was admitted where, to discharge a liability arising from money unlawfully obtained from the United States, its agents received a draft belonging to the debtor, without any knowledge or notice that the debtor had obtained it by fraudulent methods; in such a case the payment will not be ordered to be refunded.⁵

A distinction drawn between consequences of the commission Distinction between

¹ *Ante*, 1602.

² *Putnam v. Sullivan*, 4 Mass. 45.

³ *L. c.* at 54.

⁴ *United States v. State Bank*, 96 U. S. (6 Otto), 30.

⁵ *State Bank v. United States*, 114 U.S. (7 Davis), 401.

consequences dependent on the commission of a crime and those dependent on a breach of trust.

of a crime and the consequences of a breach of trust would explain many of the cases, and would apply to such a principle as that indicated by Pollock, C.B., in *Barker v. Sterne*;¹ though it would not apply in the case of *London and South-Western Bank v. Wentworth*,² where a broader ground is stated, namely, that forgery was immaterial, since it did not affect the rights on the bill. "Where," it was there said,³ "the bill is drawn by a real person, not only have those who claim under a forged indorsement no title to the bill, but the title is in some one else, who is entitled to have the bill restored to him and to sue upon it; and to his action a plea of payment to the man who claims under the forgery would be no defence. In the present case there is no real drawer, and the defendant could have paid the plaintiff without the risk of having to pay it a second time to another."

Limitation imposed by the House of Lords in *Earl of Sheffield v. London Joint Stock Bank*.

A limitation was for some time considered to have been imposed by the decision of the House of Lords in *Earl of Sheffield v. London Joint Stock Bank*.⁴ Certificates of railway stock, with transfers executed in blank, were handed over to a money-lender to secure an advance. The money-lender deposited these securities with his bankers as security for large loan accounts, filling in the blanks in the transfers of stock with the names of the nominees of the bankers. The interpretation put on the evidence was that the bankers must be taken to have known that the securities on pledge with them were securities taken by the money-lender in the ordinary course of his business. The money-lender having become bankrupt, the bankers claimed to retain the securities to satisfy the debt due to them. The Court of Appeal⁵ held that the bonds must be treated as negotiable securities, and that the bank were entitled to hold them as security for all the debt due to them. The House of Lords reversed this decision as "founded on the Court's forgetting that at the same time that the bankers lent their money they had notice" of the infirmity of the pledgor's title, or of such facts and matters as made it reasonable that inquiry should be made into such title.⁶ This fact of notice (the Lord Chancellor (Halsbury) went further, and was of opinion the

¹ 9 Ex. 684, at 687: "When a person issues a document of that kind [*i.e.*, a bill of exchange] the rest of the world must judge of the authority to fill it up by the paper itself, and not by any private instructions."

² 5 Ex. D. 96.

³ *L. c.* at 101.

⁴ 13 App. Cas. 333; *Duggan v. London and Canadian Loan Company*, 20 Can. S.C.R. 481. In *Hennequin v. Clews*, 111 U. S. (4 Davis) 676, it was held that one hypothecating securities which had been pledged to him to secure the obligation of another and failing to return them when such obligation is discharged, does not thereby create a debt by fraud or in a fiduciary capacity, which is exempted by the United States Bankruptcy law (sec. 5117 Revised Statutes) from the operation of a discharge in bankruptcy.

⁵ Under the name of *Easton v. London Joint Stock Bank*, 34 Ch. D. 95.

⁶ Per Lord Bramwell, 13 App. Cas. at 346.

bankers had "actual knowledge"), that should have put the bankers on inquiry as to the title of the securities they were taking, was held sufficient to disentitle them, assuming the securities were negotiable, and *à fortiori* if they were not negotiable.²

*Simmons v. London Joint Stock Bank*³ was held by the Court of Appeal to be undistinguishable from *Earl of Sheffield v. London Joint Stock Bank*. In *Simmons v. London Joint Stock Bank* the facts proved were as follows: A stockbroker, entrusted with bonds of a foreign company payable to bearer, pledged them with his banker, together with bonds belonging to others of his clients, to cover an advance to himself. The bankers did not know to whom the bonds belonged and did not inquire, and their loan not being paid, sold the bonds. The Court were of opinion that the bankers based their action on a mistaken assumption that a deposit *en bloc* of securities, without authority from the client, was recognised by law. The conclusion of the Court of Appeal is summed up in these words: "The bank never became *bond fide* holders for value without notice, since they never believed that Delmar [the stockbroker] was the true owner, and never, indeed,

¹ 13 App. Cas. at 341.

² Cp. *Société Générale de Paris v. Walker*, 11 App. Cas. 20. The propositions of law collected from Lord Selborne's opinion are summarised by Stirling, J., *Roots v. Williamson*, 38 Ch. D. 485, at 493. See *Colonial Bank v. Whinney*, 11 App. Cas. 426; *Colonial Bank v. Hepworth*, 36 Ch. D. 36; *Magnus v. Queensland National Bank*, 36 Ch. D. 25, 37 Ch. Div. 466; *Moore v. North-Western Bank* (1891), 2 Ch. 599. A company must be entitled to some time, if they want it, to consider the documents which are brought to them for registration, *In re Otto's Kopje Diamond Mines, Limited* (1893), 1 Ch. 618. In *Williams v. Colonial Bank*, 36 Ch. D. 659, Kekewich, J., held that there was no duty on bankers to inquire as to title, where certificates of shares, not being negotiable instruments, indorsed in blank, are proposed to be deposited with them as security for advances; but as to this he was overruled, 38 Ch. Div. 388, on the authority of *Earl of Sheffield v. London Joint Stock Bank*, 13 App. Cas. 333, and the decision was affirmed, *Colonial Bank v. Cady and Williams*, 15 App. Cas. 267. In *St. Romes v. Cotton Press Company*, 127 U. S. (20 Davis) 614, at 619, it is said: "If a corporation has by negligence cancelled a person's stock, and issued certificates therefor to a third party who has purchased it from one not authorised to sell it, is the true owner bound to pursue such purchaser, or may he directly call upon the corporation to do him right and justice by replacing his stock or paying him for its value? The weight of authority would seem to be in favour of the latter alternative." Where a seller has done all he can to effectuate a transfer by the delivery of certificates and the execution of a power of attorney sufficient to effect a transfer, which remains incomplete through the negligence or fraud of the buyer, the Supreme Court of the United States has held that the liability of the seller does not remain: *Whitney v. Butler*, 118 U. S. (11 Davis) 655.

³ (1891) 1 Ch. 270, (1892) App. Cas. 201. As to the effect of a "certification" which does not work an estoppel, see *Bishop v. Balkis Consolidated Company*, 25 Q. B. Div. 512; A "certification" is distinguished from a "certificate" by *Tomkinson v. Balkis Consolidated Company*, (1891) 2 Q. B. 614, (1893) App. Cas. 396, adopting *In re Bahia and San Francisco Railway Company*, L. R. 3 Q. B. 584, explained *In re Otto's Kopje Diamond Mines, Limited* (1893), 1 Ch. 618. The giving a "certificate" amounts to a statement by the company giving it that the persons certified as the holders are entitled to the shares; and when purchasers have acted on that statement the company are estopped from denying its truth and liable in damages to the value of the shares. For the circumstances in which certificates placed in the hands of a third person, who is invested with apparent authority to deal with them and who does deal with them, may be so used as to defeat the real owner's title, see *Laughlin v. District of Columbia*, 116 U. S. (9 Davis) 485.

⁴ Per Bowen, L.J., (1891) 1 Ch. at 295.

believed that any authority had been given by the true owner, which alone in law could justify what was being done. On the contrary, they chose to shut their eyes to this necessary part of the inquiry under a misconception of the law."

Distinguished
from Earl of
Sheffield v.
London Joint
Stock Bank in
the House of
Lords.

The bankers appealed to the House of Lords against the judgment of the Court of Appeal on the ground that the decision in *Sheffield v. London Joint Stock Bank* turned entirely on the special nature of the business of the money-lender, whose clients' securities were there sold by the bankers, and was a mere decision as to facts and not to law. The House sustained this view, and reversed the judgment of the Court of Appeal, affirming the broad proposition laid down by Abbott, C.J., in *Gorgier v. Mieville*¹ "that whoever is the holder of a negotiable instrument 'has power to give title to any person honestly acquiring it.'"

Sheffield v.
London Joint
Stock Bank.

In arriving at their decision the learned Law Lords elaborately distinguished *Earl of Sheffield v. London Joint Stock Bank*, which they explained to lay down no wider proposition than "that a purchaser, even for value, cannot insist on his purchase if he knows that the person from whom he purchases has no right to sell."² That decision, it was said,³ proceeded on the lines of *Cooke v. Eshelby*,⁴ that "it would be inconsistent with fair dealing that a latent principal should by his own act or omission lead a purchaser to rely upon" his right "against the agent as the real seller, and should nevertheless be permitted to intervene and deprive the purchaser of that right," after his position had been made worse by reliance on the latent principal's authority. "In any other case" says Lord Herschell⁵ referring to *Earl of Sheffield v. London Joint Stock Bank*, "the tribunal must investigate the facts for itself, and determine whether those who claim to hold a negotiable instrument have made out that they took it in good faith and for value." To avoid misconception of Lord Herschell's meaning in this passage we must bear in mind that in the ordinary case of taking a negotiable instrument the *onus* is on the person impugning the title of the holder; so that Lord Herschell's dictum must be confined to those cases where, by shewing circumstances of suspicion, the *prima facie* presumption in favour of the holder is displaced, and he is called on to shew that his possession of the instrument is consistent with good faith and that he is a holder for value.⁷

Caution.

¹ 3 B. & C. 45, at 47; *Foster v. Pearson*, 1 Cr. M. & R. 849.

² See per Lord Halsbury, C., (1892) App. Cas. 201, at 212.

³ Per Lord Halsbury, C., *l.c.* at 208.

⁴ (1892), App. Cas. at 299.

⁵ 12 App. Cas. 271.

⁶ (1892), App. Cas. at 221.

⁷ *Cp. Angle v. North-Western Mutual Life Insurance Company*, 92 U. S. (2 Otto) 330, at 341, 342.

The effect of the decision in *London Joint Stock Bank v. Simmons*, when coupled with the explanatory remarks on *Earl of Sheffield v. London Joint Stock Bank*, may, therefore, be stated to be to discredit any doctrine of constructive notice in the law of negotiable instruments,¹ and to reassert the old accepted doctrine that the only conditions necessary to give a good title to a person taking a negotiable instrument from one who has, as against the true owners, no authority to transfer it, are that he should take it *bonâ fide* and for value. "Regard to the facts of which the taker of such instruments had notice is most material in considering whether he took in good faith;"² so that, in this view, shutting the eyes to suspicion is a consideration of vital moment.

Earl of *Sheffield v. London Joint Stock Bank* probably suggested the attempt made in *Thomson v. Clydesdale Bank Limited*,³ by trustees to recover from a banker money paid in by a stockbroker to his overdrawn account; which money was the proceeds of the sale of trust stocks, and was applied by the bank in reduction of their customer's (the stockbroker's) debt to them. The argument for the trustees was that so soon as the bankers had notice that an account is a trust account, they were disentitled to retain the money against the real owners. To this the answer was made that in *London Joint Stock Bank v. Simmons* it was held not to be enough to have reason to believe that the fund that was being dealt with was another's property; there must be also a belief that the person dealing with it was acting fraudulently. *Ex parte Cooke*⁴ was cited to prove that the relation between stockbroker and client is that of trustee and *cestui que trust*. In *ex parte Cooke*, however, the question was only

¹ *E.g.*, per Lord Halsbury, 13 App. Cas. at 341, "If they (*i.e.*, the bankers) had reason to think that the securities might be Mozley's own or might belong to somebody else, I think they were bound to inquire"; per Lord Watson at 343: "In my opinion the character of the transactions between the respondents and Mozley was of itself sufficient to notify to them that his interest was limited"; per Lord Bramwell at 346, "The expression should be something like this. "Notice of the infirmity of the pledgor's title or of such facts and matters as made it reasonable that inquiry should be made into such title"; per Lord Macnaghten at 348: "They (the bankers) did not choose to inquire what that authority was." In *Colonial Bank v. Cady and Williams*, 15 App. Cas. 267, at 283, Lord Herschell had previously negatived any doctrine of constructive notice in the acquiring title to negotiable instruments. See also per Lord Herschell, *London Joint Stock Bank v. Simmons* (1892), App. Cas. at 223, where the obligation of making inquiry is limited to the case where "there is anything to arouse suspicion, to lead to a doubt whether the person purporting to transfer" "is justified in entering into the contemplated transaction," when the neglect to inquire would be "inconsistent with good faith." *London and Canadian Loan and Agency Company v. Duggan*, (1893), App. Cas. 506.

² Per Lord Herschell (1892), App. Cas. at 221; *Venables v. Baring Bros.* (1892), 3 Ch. 527; *Baker v. Nottingham and Nottinghamshire Banking Company*, 60 L. J. Q. B. 542; *Bentick v. London Joint Stock Bank*, (1893) 2 Ch. 120.

³ (1893) App. Cas. 282.

⁴ 4 Ch. Div. 123.

between the broker and his client. In the present case the question was between the broker's banker and his client—two innocent persons. The principle applicable in these circumstances differs, and is, that when a broker or other agent entrusted with the possession and apparent ownership of money pays it away in the ordinary course of business, though such payment is fraudulent as between agent and employer, yet the employer is bound as against third persons, unless he can shew that the person appearing to receive the money in the ordinary course of business did not in fact so receive it, but was wanting in good faith in the transaction; and the *onus* of proving bad faith (mere negligence being insufficient to raise an implication of it) rests on him impeaching the payment. This suffices for the decision of the case.

Simm v. Anglo-American Telegraph Company.

In *Simm v. Anglo-American Telegraph Company*,¹ the system of inquiry by companies before the registration of a transfer is said to be modern, and "clearly a practice to which they have recourse for their own benefit and not for the benefit of any one else; because, although there may be no estoppel between them and a person who brings transfers to them, there would be between them and his transferees, and therefore, in order to keep themselves out of trouble they ought to endeavour to ascertain whether the transfer brought to them is a valid instrument." A company is not precluded from saying to a transferee who has brought them a forged transfer to register: "You brought us a forged transfer; we believed it to be genuine, and we have registered you as stockholders; but we are not precluded from saying that the transfer was forged and that you had not a real title."² This was what was done in *Simm v. Anglo-American Telegraph Company*. What purported to be a transfer of shares was brought to the defendants, and it was declared that no duty upon the company existed to inquire of the registered holder of the shares whether his signature to the transfer was genuine, although it was the practice of the company to inquire for their own protection. Consequently, in an action against them by the transferee the defendant company were entitled to succeed.

Balkis Consolidated Company v. Tomkinson.

This decision was strongly pressed as governing in *Balkis Consolidated Company v. Tomkinson*.³ In *In re Bahia and San Francisco Railway Company*⁴ it had been held that the giving of a certificate by a company amounted to a statement by the company which was intended by them to be acted upon by the purchasers of shares in the market, that the persons certified as

¹ 5 Q. B. Div. 188, per Bramwell, L.J., at 203.
² (1893) App. Cas. 396.

³ *Ibid.*

⁴ L. R. 3 Q. B. 584.

the holders were entitled to the shares; and that the purchasers, having acted on that statement by the company, the company were estopped from denying its truth and liable to pay as damages the value of the shares. In *Balkis Consolidated Company v. Tomkinson* a distinction was drawn based on the fact that in *In re Bahia and San Francisco Railway Company* the person seeking to render the company liable was the purchaser of the shares, in whose favour the certificate of the company might work an estoppel; while in *Balkis Consolidated Company, Tomkinson*, the vendor of the shares was suing, who himself received the certificate from the company; and the case was accordingly brought within the decision in *Simm v. Anglo-American Telegraph Company*, that one who receives from a company a certificate that he is the proprietor of shares therein is not in the same position as regards his rights by estoppel as a transferee from him would be. Lord Herschell, C., however points out that the ground for the decision in *Simm v. Anglo-American Telegraph Company* was twofold:¹ "In the first place, that Burge had not altered his position by reason of the statement in the certificate; in the next place, that he had himself, by producing to them a forged transfer, induced the company to insert the name of his nominee as the proprietor of the stock." In *Balkis Consolidated Company v. Tomkinson*, moreover, there was negligence on the part of the company. "The company had certified the transfer to the plaintiffs—that is, they had stated in effect that there was in their possession a certificate shewing the title of Powter [the fraudulent assignor] to make the transfer to them; they knew, and the plaintiffs did not, that they had already certified a transfer of these very shares from Powter to Maitland and Balfour, and that the certificate referred to in their endorsement, "Certificate lodged," bore on the face of it a statement showing this was not the case." They were accordingly held liable.

Lord
Herschell's
opinion.

In this connection may be treated the negligence of a mortgagee or his agent, by which some other person has been led to prejudice himself in dealing with the mortgaged estate.

Negligence of
a mortgagee or
his agent
prejudicing a
dealing with
the mortgaged
estate.

The principle applicable has been clearly marked out by Lord Cranworth, C., in *Perry-Herrick v. Attwood*:² "I consider it to have been established beyond doubt that the law is that the person having the legal estate without the title-deeds is not to be postponed to a subsequent encumbrancer having the title-deeds, unless he has been guilty of something which the law calls fraud or gross negligence."

¹ (1893), App. Cas. at 406.

² 2 De G. & J. 21, at 37.

Ground of
the duty.

Lord
Selborne in
Agra Bank
v. Barry.

This principle has, however, not always been acquiesced in, and it has been sought to base it on the ground of a duty to keep title-deeds secure, "as if title-deeds were in the eye of the law analogous to fierce dogs or destructive elements, where, from the nature of the thing, the Courts have implied a general duty of safe custody on the part of the person having their possession or control."¹ Lord Selborne, however, points out in *Agra Bank v. Barry*,² that the only foundation for this is the ambiguity arising from confounding "the course which a man dealing *bona fide* in the proper and usual manner for his own interest ought, by himself or his solicitor, to follow with a view to his own title and his own security," and the absence of which may be evidence of a want of good faith in his proceedings if subsequently he sells or mortgages the property, with an alleged obligation to any possible holder of the title or security to guard him against defects that may arise through his want of care. The duty merely signifies that the owner is expected to act in his own affairs as the average reasonable and prudent person would be expected to do. If this so-called duty to a man's self is unperformed, in the event of the title being transferred to a third person, the neglect of ordinary precautions by the owner becomes, as against him and in favour of his assignee, evidence of "that gross negligence that amounts to evidence of fraud," or, as Lord Eldon subsequently varies his phrase, "that gross negligence, that amounts to evidence of a fraudulent intention."

Fry, L.J.,
differentiates
gross negli-
gence from
fraud.

Fry, L.J., regards this expression as "certainly embarrassing, for negligence is the not doing of something from carelessness and want of thought or attention; whereas a fraudulent intention is a design to commit some fraud, and leads men to do or omit doing a thing, not carelessly, but for a purpose."

His view
discussed.

The distinction thus brought out between a negligent and a fraudulent act is undoubtedly just. The infirmity of the reasoning is, however, the assumption that each of these states of fact carries on its face the mark of its character; while in truth this is not so; since the same collection of facts may be consistent either with the grossest negligence or with the existence of fraud, and yet there may be no indications to direct the judgment preferentially to one or the other of the two conclusions. For example, a man may so fail to observe the most common prudence in the custody of his title-deeds that a fraud is perpetrated by means of them. His

¹ Per Fry, L.J., *Northern Counties of England Fire Insurance Company v. Whipp*, 26 Ch. Div. 482, at 493.

² L. R. 7 H. L. 135, at 157.

³ Per Lord Eldon, *Evans v. Bicknell*, 6 Ves. 174, at 190. As to wilful misrepresentation as to credit, *Ex parte Carr*, 3 Ves. & B. 108.

disregard of all precautions may be due to his being an accomplice in the fraud, or from fatuity of confidence in the defrauder. The facts give no clue which inference—of fraud or of negligence—is to be drawn. The facts then being fixed and the inference ambiguous, an element of uncertainty in the philosophic truth of the conclusion is inevitable. But the law cuts the knot by saying in all such cases—where the negligence is so gross as to warrant an inference that what, though superficially consistent with “carelessness and want of thought or attention,” may be in reality contrivance, “a design to commit some fraud,” and to lead men “to do or omit doing a thing, not carelessly, but for a purpose”—whichever conclusion, whether that of fraud or that of negligence, is rightly to be drawn, the consequences, so far as civil liabilities go, shall not be affected; that negligence so gross as to imply a want of moral qualities shall be fixed with the same liability that the law attaches to certain descriptions of fraud.¹

That some meaning of this sort is underlying Fry, L.J.’s, language is seen not only from his explanation² of Perry Herrick

¹ This may be illustrated by a passage from Gaius: “*Neque enim lex facere potest, ut qui manifestus fur non sit, manifestus sit, non magis quam qui omnino fur non sit, fur sit, et qui adulter aut homicida non sit, adulter vel homicida sit; at illud sane lex facere potest, ut proinde aliquis pœna teneatur atque si furtum vel adulterium vel homicidium admisisset quamvis nihil eorum admisisset.*” Gaius 3, § 194. In D. 11, 6, 1, § 1, we find *lata culpa plane dolo comparabitur*; in D. 17, 1, 29, *Dissoluta enim negligentia prope dolum est*; in D. 26, 10, 7, § 1, *si fraus non sit admissa, sed lata negligentia, quia ista prope fraudem accedit, removeri hunc quasi suspectum oportet.* These and many other texts are discussed by Story, Bailments, §§ 19–23, whose conclusion is that gross negligence “may, in certain cases, afford a presumption of fraud,” and “in very gross cases it may approach so near as to be almost undistinguishable from it,” but “generally gross negligence and fraud” are not “convertible terms.” In D. 44, 7, 1, § 5, *Magnam tamen negligentiam placuit in doli crimine cadere*; in D. 47, 4, 1, § 2, *Culpa dolo proxima dolum representat*; and in D. 50, 16, 226, *Magna negligentia, culpa est; magna culpa, dolum est.* In Goodman v. Harvey (1836), 4 A. & E. at 876, Lord Denman, C.J., says: “Gross negligence may be evidence of *mala fides*, but is not the same thing. We have shaken off the last remnant of the contrary doctrine.” This has been cited (Smith v. Essery, 9 N. Z. L. R. 464 (C. A.)), apparently in support of a proposition that gross negligence cannot carry the consequences of fraud. It is evident that all that is said is with reference to the nature of the two acts, not as to the identity of their consequences in certain relations. If more was meant, then the cases noticed largely impugn its authority. The same learned judge (Lord Denman, C.J.) illustrates the point now sought to be made in his judgment in Lynch v. Nordin (1841), 1 Q. B. 29, at 38; he says: “Between wilful mischief and gross negligence the boundary line is hard to trace; I should rather say impossible. The law runs them into each other, considering such a degree of negligence as some proof of malice.” Wigram, V.C., in Jones v. Smith, 1 Hare 43, at 71, cites Lord Denman’s dictum in Goodman v. Harvey with approbation, and adds: “The doctrines of law and equity upon this point ought to be concurrent.” Again, Tindal, C.J., in re Hall and Hinds (1841), 2 M. & G. 847, at 852, almost contemporaneously with Lord Denman, says, speaking of misconduct of arbitrators: “The mistake and act of carelessness is so great as to amount, though not in a moral point of view, yet in the judicial sense of that term to *misconduct* on the part of the arbitrators. *Lata culpa* or *crassa negligentia*, both by the civil law and our own approximates to, and in many instances cannot be distinguished from, *dolus malus* or misconduct.” Vinn. Instit. Imper. Comm. lib. 3, tit. 15 b. 605.” As to negligence so gross that a Court of Equity will treat it as evidence of fraud, see 2 Spence, Eq. Jur. 755; and the cases cited in the argument of the Dean of Faculty in Ræ v. Meek, 14 App. Cas. 558, at 565, where it is spoken of as negligence “of such a character that the trustee cannot be heard to say it is not fraud.”

² 26 Ch. Div. at 492.

Lord Eldon's
meaning in
Evans v.
Bicknell.

v. Attwood,¹ but also from his gloss upon Lord Eldon's words:² "Lord Eldon seems to have meant by his words to describe the not doing of something, so ordinarily done by honest men under the given circumstances as to be really attributable, not to negligence or carelessness, but to a fraudulent intention. In short, it appears to us that in the mouth of Lord Eldon the word 'negligence' was used simply to express nonfeasance." A reference to the report will shew that this is not Lord Eldon's meaning. In *Evans v. Bicknell*³ the defendant was charged, not for negligence in not doing something, but for negligence in actively handing over deeds to a person whose possession of them enabled him to perpetrate a fraud. Lord Eldon's words⁴ are: "It amounts to no more than that a trustee delivers the deeds into the hands of a party who has the settlement. I do not say it is not negligence; but it is too dangerous upon such loose evidence to hold that it is that gross negligence that amounts to evidence of fraud." There is, nevertheless, an indication of opinion that whether carelessness or fraudulent intention is the governing notion may be ambiguous; and if there is "the not doing of something so ordinarily done by honest men under the given circumstances," it may be attributed to fraud, and not negligence. Why the same attribution to fraud may not be made where there is a positive act without manifest intention that may operate as negligence, and why it is necessary positively to attribute a fraudulent intention and not to allow the designation of the act to remain ambiguous, is not explained.⁵

Lord Cran-
worth's
opinion in
Colyer v.
Finch.

In accordance with what has been urged is the principle laid down by Lord Chancellor Cranworth in moving the judgment of the House of Lords in *Colyer v. Finch*.⁶ The question was whether Mr. Finch, a mortgagee, was disqualified from setting up his prior legal title by reason of having left title-deeds of the mortgagor under his control, by means of which the latter was able to make an apparently good title to the appellant. The

¹ 2 De G. & J. 21.

² 26 Ch. Div. at 489.

³ 6 Ves. 174.

⁴ 6 Ves. at 189.

⁵ *Cp. Manners v. Mew*, 29 Ch. D. 725.

⁶ 5 H. L. C. 905, at 928. See the same principle re-asserted by the Lord Chancellor in *Perry Herrick v. Attwood*, 2 De G. & J. 21, at 37; and powerfully put by Turner, V.C., in *Hewitt v. Loosemore*, 9 Hare 449, at 458: "Gross or wilful negligence which, in the eye of this Court, amounts to fraud." Also per Alderson, B., in *Whitbread v. Jordan*, 1 Y. & C. (Ex.) 303, approved as to this point by Lord Lyndhurst, C., in *Jones v. Smith*, 1 Ph. 244, at 255, and by Hall, V.C., in *Clarke v. Palmer*, 21 Ch. D. 124, at 129. In *Keith v. Burrows*, 1 C. P. D. 722, at 734, it is said by Lindley, J.: "The mere omission by a person to do something which it is not his duty to do, but which, if done, would have prevented loss to another, is not sufficient to render such person liable for such loss, nor to deprive him of any right which he would otherwise have had against that other." In the case in which this was said the omission was to register a mortgage, whereby the defendant who searched the register was misled into lending their money by the non-registration of the plaintiff's security.

Lord Chancellor said: "The rule on this subject is now well settled. A first mortgagee having the legal title is not to be postponed to a subsequent purchaser or mortgagee, merely because he has not possessed himself of the title-deeds. In order to deprive the first mortgagee of his legal priority, the party claiming by title subsequent must satisfy the Court that the first mortgagee has been guilty either of fraud or gross negligence but for which he would have had the deeds in his possession. What are the circumstances which will amount to or be evidence of gross negligence it is difficult to define beforehand; but I think that *prima facie* a mortgagee who, knowing that his mortgagor has title-deeds, omits to call for them, or who omits to make any inquiry on the subject, must be considered to be guilty of such negligence as to make him responsible for the frauds which he has thus enabled his mortgagor to commit."

James, L.J., states the principle to the same effect, though he uses the term 'wilful negligence,' which probably means a negli-

James, L.J.'s,
opinion.

¹ *Roberts v. Croft*, 2 De G. & J. 1. A mortgagee is not a trustee for the mortgagor until it is shown that he has sold and that there is a surplus, when the mortgagee becomes constructively a trustee for the surplus, *Banner v. Berridge*, 18 Ch. D. 254; see also *White v. City of London Brewery Company*, 39 Ch. D. 559 (citing *Dobson v. Land*, 8 Hare 220), at 564, affirmed 42 Ch. Div. 237. This opportunity may be taken for considering the amount of negligence which will render a mortgagee liable in respect of deterioration in the value of the mortgaged premises while in his possession. This was treated of by Alderson, B., in *Wragg v. Denham*, 2 Y. & C. (Ex.) 117, at 121, 122. "It is clear," he says, "that a mortgagee ought not to be charged with deterioration arising in the ordinary way, by reason of houses and buildings of a perishable nature decaying by time," referring to *Russell v. Smithies*, 1 Anstr. 96. "But if there be gross negligence, by which the property is deteriorated in value, the mortgagee who is in possession is trustee for the mortgagor to that extent that he ought to be made responsible for that deterioration during the time of his possession. It is not necessary to go the length of showing fraud in the mortgagee; gross negligence is sufficient." See further a note to 4 Y. & C. (Ex.) 570, where Lord Hardwicke is reported as holding that "a mortgagee in possession ought to do such repairs as he can repay by the rents of the estate after his interest paid, but he need not rebuild or lay out large sums beyond the rent, for that would be to lend more principal money upon, perhaps, a deficient security." As to loss or destruction of deeds by the mortgagee, *Stokoe v. Robson*, 3 Ves. & B. 51; *Midleton v. Eliot*, 15 Sim. 531; 2 Spence. Eq. Jur. 690; *Cooto Mortgages* (5th ed.), 816.

² See per Lord Selborne, C., *Dixon v. Muckleston*, L. R. 8 Ch. 155, at 160, where the phrase is "wilful and unjustifiable neglect." "Wilful negligence," strictly interpreted, imports a contradiction in terms, as Quain, J., points out in *McCawley v. Furness Railway Company*, L. R. 8 Q. B. 57, at 60: "Negligence, even gross, is the very thing which the contract stipulates that the defendants shall not be liable for; and 'wilful' cannot carry the case any further, especially as the company would not be liable for a wilful act of commission by a servant, though they would be for his gross negligence." See per Blackburn, J.: "Negligence in almost all instances would be the act of the company's servants and 'at his own risk' would of course exclude that, and gross negligence would be within the terms of the agreement; as to wilful, I am at a loss to say what that means." See *Hill v. Simpson*, 7 Ves. 152, as to power of executors to dispose of the testator's assets, and gross negligence of persons in dealing with them. "Common prudence required that they should look at the will and not take the debtor's word as to his right under it. If they neglect that and take the chance of his speaking the truth, they must incur the hazard of his falsehood. The rights of third persons must not be affected by their negligence. I do not impute to them direct fraud; but they acted rashly, incautiously, and without the common attention used in the ordinary course of business." "It was gross negligence not to look at the will, under which alone a title could be given to them. It was not necessary to use any exertion to obtain information, but merely not to shut their eyes against the information, which without extraordinary neglect they could not avoid receiving."

gence that contravenes all ordinary rules of prudence. He says:¹ The legal mortgagee "must have been guilty of fraud or of that wilful negligence which leads the Court to conclude that he is an accomplice in the fraud."

Bowen, L.J.,
in *Le Lievre*
v. Gould.

Bowen, L.J., treats the matter with his customary felicity² in discussing the source of the error in *Derry v. Peek*. "There must," he says, "be fraud in order to found an action of fraud. There are two reasons, I think, why there has been some confusion in the minds of some people with regard to that almost elementary proposition. The first is the fact that equity judges had to decide questions of law and fact together. An equity judge, when he had to deal with a question of fraud, discussed his reasons for coming to the conclusion that there had been fraud, and it very often happened that an equity judge decided that there was fraud in a case in which gross negligence had been proved. If the case had been tried with a jury the judge would have pointed out to them that gross negligence might amount to evidence of fraud, if it were so gross as to be incompatible with the idea of honesty, but that even gross negligence in the absence of dishonesty did not of itself amount to fraud. Cases of gross negligence in which the Chancery judges decided that there had been fraud, were piled up one upon another, until at last a notion came to be entertained that it was sufficient to prove gross negligence in order to establish fraud. That is not so. In all those cases fraud and dishonesty were the proper *ratio decidendi*, and gross negligence was only one of the elements which the judge had to consider in making up his mind whether the defendant's conduct had been dishonest." It is submitted that the statement in this last sentence is not to be construed as if there must necessarily be other elements than the gross negligence to warrant the conclusion of fraud. The negligence may be such that, unexplained in itself, it requires the conclusion of fraud to be drawn from it.³ The inference, however, is not one of law, but of fact.⁴

Division of
the subject in
Fry, L.J.'s,
judgment in
Northern
Counties of
England Fire
Insurance
Company *v.*
Whipp.

Passing, then, from the consideration of the governing principle to the various manifestations of it, the subject is admirably distributed by Fry, L.J., in *Northern Counties of England Fire Insurance Company v. Whipp*,⁵ into—

¹ *Ratliffe v. Barnard*, L. R. 6 Ch. 652.

² *Le Lievre v. Gould* (1893), 1 Q. B. 491, at 500.

³ So, too, with regard to malice: "Undoubtedly there may be cases in which there is either *mala fides* or that *crassa negligentia* which implies malice:" *The Strathnaver*, 1 App. Cas. 58, at 67, citing *The Evangelismos*, 12 Moo. P. C. C. 352; *The Walter D. Wallett*, (1893) P. 202.

⁴ *Wilson v. Y. & M. R. Road*, 11 G. & J. (Md.) 58, *Putnam's Supplement to Metcalf's* (U. S.) Digest, vol. ii. 44.

⁵ 26 Ch. Div. 482, at 487.

I. Those cases which relate to the conduct of the legal mortgagee in not obtaining possession of the title-deeds; and

II. Those cases which relate to the conduct of the legal mortgagee in giving up or not retaining the possession of the title-deeds after he has obtained them.

I. The former of these classes is further subdivided—

(a) Where the legal mortgagee or purchaser has made no inquiry for the title-deeds, and has been postponed either to a prior equitable estate¹ or to a subsequent equitable owner who used diligence in inquiring for the title-deeds;²

(β) Where the legal mortgagee has made inquiry for the deeds and has received a reasonable excuse for their non-delivery, and has accordingly not lost his priority;³

(γ) Where the legal mortgagee has received part of the deeds under a reasonable belief that he was receiving all, and has accordingly not lost his priority;⁴

(δ) Where the legal mortgagee has left the deeds in the hands of the mortgagor, with authority to deal with them for the purpose of raising money on the security of the estate, and he has exceeded the collateral instructions given to him;⁵

II. The second class of cases Fry, L.J., divides into—

(a) Those where the title-deeds have been lent by the legal mortgagee to the mortgagor upon a reasonable representation made by him as to the object in borrowing them, and the legal mortgagee has retained his priority over the subsequent equities;⁶

(β) Those where the legal mortgagee has returned the deeds to the mortgagor for the express purpose of raising money on them, though with the expectation that he would disclose the existence of the prior security to any second mortgagee. In such cases the Court has, on the ground of authority, postponed the legal to the equitable estate.⁷

¹ *Worthington v. Morgan*, 16 Sim. 547. See *Wormald v. Maitland*, 35 L. J. Ch. 69.

² *Clarke v. Palmer*, 21 Ch. D. 124.

³ *Barnett v. Weston*, 12 Ves. 130; *Hewitt v. Loosemore*, 9 Hare 449; *Agra Bank v. Barry*, L. R. 7 H. L. 135. See also *Sharpe v. Foy*, L. R. 4 Ch. 35.

⁴ *Hunt v. Elmes*, 2 De G. F. & J. 578; *Ratcliffe v. Barnard*, L. R. 6 Ch. 652; *Colyer v. Finch*, 5 H. L. C. 905.

⁵ See *Perry Herrick v. Attwood*, 2 De G. & J. 21.

⁶ *Peter v. Russel*, or *Thatched House Case*, 1 Eq. Cas. Abr. 321; *Martinez v. Cooper*, 2 Russ. 198; *Layard v. Maud*, L. R. 4 Eq. 397.

⁷ *Briggs v. Jones*, L. R. 10 Eq. 92; *In re Ingham*, *Jones v. Ingham* (1893), 1 Ch. 352. In *Brocklesby v. Temperance Permanent Building Society* (1893), 3 Ch. 130, at 141. Lindley, L.J., says: "These cases do not turn on fraud or negligence. They are based on the principle that a legal owner of deeds who entrusts them or the control of them to an agent in order that he may raise money on them, cannot, in equity at all events, recover them from a person who has *bond fide* advanced money on them without notice of anything wrong, except on the terms of paying what that person has advanced on the security of the deeds handed over to him." The decision of the Court of Appeal was affirmed in the H. of L. 11 Times L. R. 297. As to priorities

Examination
of the law
where there is
a conflict
between two
equities.

Kay, J., in
Taylor v.
Russell.

The question then arises whether, the law being as we have found it to be, in the case of a contest between the legal estate and an equitable interest, there is any difference in the rule where conflicting equities only are involved.

The opinion of Kay, J., in *Taylor v. Russell*¹ is expressed most uncompromisingly in the negative. He holds the two cases are identical so far as the application of a standard of care goes. Speaking of displacing the first of two equitable mortgagees, he says: "I have not found any case of authority in which this has been done on the ground of negligence that was not 'gross'—that is, so great as to make the prior mortgagee responsible for the fraud committed on the subsequent mortgagee. This seems to me to be the accurate statement of the rule as between two equitable mortgagees; and for this view of the law there is positive and very high authority." He then cites statements of the law by Turner, L.J.,² Lord Cairns,³ Lord Cranworth⁴ and Lord Selborne,⁵ which "are not *obiter dicta*, but the carefully worded reasons on which some of the most eminent of modern judges based their decisions,"⁶ and adds: "Nothing short of a decision of the House of Lords can overrule the law so laid down." "I conclude, therefore," says Kay, J.,⁷ "that the negligence necessary to postpone the first equitable mortgagee in such a case as the present, must be so gross as to render him responsible for the fraud committed upon the second mortgagee." The judgment of Kay, J., was appealed against, and reversed by the Court of Appeal,⁸ but on another ground, and Fry, L.J., who delivered the considered judgment of the Court merely referred to this point by saying: "It becomes needless for us to enter upon a discussion as to any question of negligence, or as to the relative equities of the plaintiff and defendants."

Farrand v.
Yorkshire
Banking
Company.

In the argument in *Taylor v. Russell* before Kay, J., the case

between equitable mortgagees and others, *Russell v. Russell*, 1 *White & Tudor*, L. C. in *Equity* (6th ed.), 794, note, Priorities as between Equitable Mortgagees and Others. Where there are equities which are otherwise equal, the possession of the deeds gives priority to the person who has got them: *Lloyd's Banking Company v. Jones*, 29 Ch. D. 221, at 229. This does not refer to the dates being the same: per North, J., *Farrand v. Yorkshire Banking Company*, 40 Ch. D. 182, at 189. *Harpham v. Shacklock*, 19 Ch. D. 207, is commented on by Lord Herschell, *Taylor v. Russell* (1892), App. Cas. 244, at 253. As to the doctrine of *tabula in naufragio*, see *Marsh v. Lee*, 1 *White & Tudor*, L. C. in *Equity* (6th ed.), note 700, 701. For what is a "better equity," see 2 *Spence*, Eq. Jur. 728 *et seqq.*

¹ (1891), 1 Ch. 8, at 15; *Powell v. London and Provincial Bank* (1893), 1 Ch. 610, 2 Ch. 555.

² In *Cory v. Eyre*, 1 De G. J. & S. 149, at 167.

³ In *Shropshire Union Railways and Canal Company v. The Queen*, L. R. 7 H. L. 496, at 507.

⁴ In *Roberts v. Croft*, 2 De G. & J. 1.

⁵ *Dixon v. Muckleston*, L. R. 8 Ch. 155, at 161.

⁶ (1891), 1 Ch. at 17.

⁷ (1891), 1 Ch. at 24.

⁷ *Ibid.*

⁸ L. C. at 30.

of *Farrand v. Yorkshire Banking Company*¹ was cited, but is not alluded to in the judgment. In his judgment in this latter case, North, J., considering the case of the postponement of a legal mortgagee to an equitable mortgagee, and the case of a conflict between the rights of two equitable mortgagees, is reported² as saying: "The distinction, however, between the two cases is clear, and cannot be better stated than in the judgment of Cotton, L.J., in *National Provincial Bank of England v. Jackson*,³ where, after referring to Fry, L.J.'s, judgment in *Northern Counties of England Fire Insurance Company v. Whipp* as recognising the difference between the case of a contest between equities and one between an equitable title and the legal estate, he quoted this passage: 'The question is not what circumstances may, as between two equities, give priority to the one over the other, but what circumstances justify the Court in depriving a legal mortgagee of the benefit of the legal estate;'" and he added: "And the judgment in *Kettlewell v. Watson*⁴ is to the same effect. As between equitable claims, the question is, whether one party has acted in such a way as to justify him in insisting on his equity as against the other." In the opinion, then, of North, J., at least, the principle laid down by Kay, J., is not well founded. It remains, then, for us to consider the authorities.

The words used in *Northern Counties of England Fire Insurance Company v. Whipp*,⁵ and quoted by North, J., are at the best merely *obiter dicta*. The point decided in that case was that a legal mortgagee will not be postponed to an equitable mortgagee on the ground of mere carelessness. What Fry, L.J., did, possibly with reference to a point made during the argument,⁶ was to assume a state of the law, in the case of a conflict between two equities, which he decided was not good where the conflict was between the legal estate and an equity. Comment.

In *National Provincial Bank of England v. Jackson*⁷ the plaintiffs, as equitable mortgagees by memorandum and the deposit of title-deeds, claimed to enforce their security against the defendants, who had been the owners of the property in question previously to the execution of a conveyance (the validity of which they impugned as obtained by fraud), and who were still in possession. The defendants therefore had the prior equity as well as the possession of the property, while the *onus* of proving their claim was also on the plaintiffs. The defendants were held National
Provincial
Bank of
England v.
Jackson.

¹ 40 Ch. D. 182.

² *L. c.*, at 189.

³ 21 Ch. D. 685.

⁴ *L. c.*, at 485.

⁵ 33 Ch. Div. 1.

⁶ 26 Ch. Div. 482.

⁷ 33 Ch. Div. 1.

by the Court of Appeal not guilty of negligence in the conduct by which the fraud was enabled to be prosecuted, while the plaintiffs were held guilty of "great negligence" in omitting precautions which would have rendered the discovery of the fraud certain. With these facts the decision might well have been that the plaintiffs had not discharged the *onus* upon them of shewing ground for the interference of the Court in their behalf, or that they were disentitled by their own want of prudence in making enquiries.

Judgment of
Cotton, L.J.

In fact the case does seem to have been decided on some such ground. Cotton, L.J., says:¹ "It follows that the bank are not entitled to say that they relied on the recitals in making the advance so as to establish an equitable claim against the sisters"—the defendants; that is, the plaintiffs had not made out a case that shewed the conduct of the defendants to have enabled a fraud to be perpetrated on the plaintiffs. Cotton, L.J., however, made use of the expression,² "As between equitable claims the question is, whether one party has acted in such a way as to justify him in insisting on his equity as against the other." North, J., has assumed that something less than gross negligence is sufficient for this. But that it is so by no means follows from the words of Cotton, L.J., nor from the facts in *National Provincial Bank of England v. Jackson*. The contributory negligence of the plaintiffs in that case in fact disentitled them to recover. Had this been absent, had they enquired and been misled by the sisters, they would have recovered; but then the case would have been brought within the principle of *Perry Herrick v. Attwood*.³

Cases
considered.

These decisions, then, cannot be held to have established any clear difference in principle in the two classes of cases. On the other hand, the statements of the law are clear and emphatic. The principle laid down was necessary for the decision in the earliest of these, that of Lord Chancellor Cranworth in *Roberts v. Croft*⁴—"She acquired a right which was good against all other merely equitable claimants whose titles had a later origin, unless she was guilty of gross negligence (for in this case fraud by her is out of the question) enabling Roberts to commit a fraud by holding himself out as unincumbered owner of the property;" and the subsequent authorities cited by Kay, J., amply support it.

Principle
asserted by
Kay, J.

Considered on principle, the conclusion of Kay, J., appears also to be the correct one. Some confusion seems to have been imported by, perhaps unconsciously, taking as an analogy the

¹ *L. c.* at 12.

² 2 De G. & J. 21.

³ *L. c.* at 13.

⁴ 2 De G. & J. 1 at 6.

rule that a subsequent incumbrancer who gets in the legal estate is able to gain a priority over the prior *mesne* incumbrancer.¹ In that case a second mortgagee with the legal estate obtains priority over the first mortgagee. And it is not impossible the consideration that negligence producing the consequences of fraud is required to displace this priority, has suggested the notion that where the legal estate is not involved, an equitable interest may displace another equitable interest on proof of a lesser degree of negligence than is required where the legal estate is concerned. If such a notion exists, it arises from an entire misconception of the grounds of preference of the legal estate, which assuredly is not treated by Courts of Equity with any especial respect when it comes in conflict with equitable doctrine, and is not merely used as a means of determining equitable preference.

The Courts of Equity seize upon the circumstance of the possession of the legal estate, and refuse to disturb possession on that account, only where there is a conflict of equal equities. *In æquali jure melior est conditio defendentis*. Where grounds of equitable preference exist the Court resorts to them irrespective of the fact of the legal estate being in one or the other of the equitable estate holders. The rule then of the preference given to the legal estate is no more than a method of determining the *onus* of proof in a conflict of equal equities,² and is rather an accidental than an intrinsic element in the granting equitable relief—a circumstance the Courts will seize on to work out the relief that should be afforded by reference to rule, and not a recognition of a superiority of a legal over an equitable interest. Indeed, the preference of the Court is the other way, and where the conflict is between the legal estate and an equitable estate it asserts the superior claims of the equitable.³ If, then, equity regards an equitable estate as preferable to a legal, it would be a strange conclusion to come to that an equitable estate can be displaced by less onerous circumstances than can a legal estate.

The action of a Court of Equity appears to work out as follows: By hypothesis, there are *prima facie* equal equities. The problem is, which has the preference? If the Court finds one of these is tainted with fraud, on the most universal principle of jurisprudence it assists the other, even though the other has acquired the legal estate. Further than this, where there is no fraud, but only conduct which has enabled a fraud to be committed, the Court will do the same. The Court will in such a case post-

Grounds of the preference given in Equity to the legal estate.

How the equitable doctrine is worked out.

¹ Bates v. Johnson, Johns. (Ch.) 304.

² Neelin v. Wells, 104 U. S. (14 Otto.) 428.

³ Williams Real Property (10th ed.), 152, chap. viii., On Uses and Trusts.

pone the legal estate, *plus* the equity, in favour of the unassisted equity. There is yet another case—where the equities are morally equal. There the Court relies on the possession of the legal estate. The law consequently takes its course, for there is no call for equity to interfere when each party has an equal equity. Lastly, this discriminating circumstance of possession of the legal estate may be absent, and the Court of Equity being invoked, determines by what has been said to be its last ground of preference—priority of time, by which it adjudicates priority of right.¹

Contention that a lesser negligence than is required to displace a legal estate will displace an equity.

The contention, however, is that there is yet a further principle which determines priority, by reference to a standard of duty we have not yet ascertained—a lesser negligence than is required to affect the legal estate it is said will suffice to displace an equity. If this is an arbitrary principle, it must depend on authority not yet advanced for its support. If it depends on a general principle of law, it may be pointed out that the duty asserted is not to any particular person, but to the world at large; since, in the class of cases we are considering, till the moment of contest, each equitable holder is wholly ignorant of the existence of the other, and is, moreover bound to a greater amount of care in dealing with one species of property, viz., an equitable interest, than with any other.²

No duty on the part of the holder of one equitable interest to another.

Again, the duty, if any such exists, that the holder of one equitable interest has to another is plainly not that of a specialist; it is at best to refrain from *culpa lata* (*non intelligere quod omnes intelligent*). If this is so, any difference between that involved with reference to a legal estate and an equitable interest would be hard to find. But that any “duty,” in the strict sense, exists has been negatived by Lord Selborne in the case of the *Agra Bank v. Barry*.³ It has been said in argument that investigation of title and inquiry after deeds is the ‘duty’ of a purchaser or a mortgagee; and no doubt there are authorities (not involving any question of registry) which do use that language. But this, if it can properly be called a duty, is not a duty owing to the possible holder of a latent title or security. It is merely the course which a man dealing *bonâ fide* in the proper and usual manner for his own interest, ought, by himself or his solicitor, to follow, with a view to his own title and his own security. If he does not follow that course, the omission of it may be a thing requiring to be accounted for or explained. It may be evidence,

Lord Selborne’s opinion in *Agra Bank v. Barry*.

¹ *Bickerton v. Walker*, 31 Ch. D. 151. Where the equities are precisely equal, possession of the deeds determines the preference: *Rice v. Rice*, 2 Drew. 73, at 81. See *Spencer v. Clarke*, 9 Ch. D. 137.

² See the authorities collected in *Story Eq. Jur.* (12th ed.), § 1020, and notes.

³ *L. R. 7 H. L.* 135, at 157.

if it is not explained, of a design inconsistent with *bona fide* dealing to avoid knowledge of the true state of the title."

The obligation therefore is to avoid doing anything by which another person may be misled. And the only inference open to the Court, from which liability may arise, is of that gross negligence whose consequences are indistinguishable from fraudulent intent. The conclusion accordingly follows that the view of Kay, J., is right, and there is no distinction between the negligence which postpones one equity to another and that which postpones the legal estate to an equity.¹

With whom the possession of the equitable estate establishes a relation.

The remarks of Fry, L.J., in *Union Bank of London v. Kent*² should be carefully attended to. In that case the contest was between two equities, neither of the parties having any legal estate. The question was in what circumstances a pre-existing admitted equitable title could be displaced by another equitable title. Fry, L.J., distinguishes two sets of circumstances.³ "One class is where a mortgagee knows that the mortgagor has not fulfilled his obligations and yet does nothing. The other is where the mortgagee does not know that the mortgagor has failed to fulfil his obligations, but knows only that there are obligations which he may in the future fail to fulfil, and yet takes no precautions against the consequences of his doing so." To the former class is to be referred a case like *Layard v. Maud*.⁴ As to the latter the Lord Justice says: "I know of no decided case in which the mortgagee has been postponed on the ground that he did not take precautions against a future fraud by the mortgagor; and I do not know of any general rule which obliges you to assume that every person with whom you are dealing is likely to be a knave."⁵

Fry, L.J., in *Union Bank of London v. Kent*.

We are now brought to the consideration of the law as to

¹ The judgment of the Court of Appeal in *Taylor v. Russell* was affirmed by the House of Lords (1892), App. Cas. 244, on the ground that there was no equity that prevented the respondent getting in the legal estate and availing himself of its protection. The question discussed in the text was only alluded to by Lord Macnaghten (at 262), and in these terms: "This view of the case renders it unnecessary to consider what would have been the priority of the parties if the legal estate had not been got in. That question was not fully discussed, and I prefer to leave it undetermined. I will only say that I am satisfied that on the part of the appellants there was an amount of negligence which it is difficult to excuse or understand; and I am not at present convinced of the correctness of the view expressed by the learned judge who tried the case in the first instance, that negligence necessary to postpone a prior equitable mortgagee in such a case as the present must be so gross as to render him responsible for the fraud committed on the second mortgagee, and that in fact it is immaterial in such cases, whether the prior mortgagee has or has not the legal estate."

² 39 Ch. Div. 238.

³ L. R. 4 Eq. 397.

⁴ 39 Ch. D. at 248.

⁵ L. c. at 247.

⁶ Cp. *ante* 896. *Roots v. Williamson*, 38 Ch. D. 485 is a case of a pre-existing equitable title not defeated by subsequent dealings with shares, the subject affected to be dealt with.

Actual notice. notice. Notice may be actual or constructive. Actual notice is matter of fact and admits of no legal distinctions.

Constructive notice. Constructive notice is defined to be "no more than evidence of notice, the presumptions of which are so violent that the Court will not allow even of its being controverted. Thus, if a mortgagee has a deed put into his hands which recites another deed which shows a title in some other person, the Court will presume him to have notice, and will not permit any evidence to disprove it"¹

General principle. The general principle has been stated that whatever is sufficient to put a person upon inquiry is good notice—that is, where a man has sufficient information to lead him to a fact he shall be deemed to have knowledge of it.²

It is "scarcely possible to declare *a priori* what shall be deemed constructive notice, because unquestionably that which would not affect one man may be abundantly sufficient to affect another."

Cases of constructive notice classified. The cases have been classified by Wigram, V.C.³ First, into those in which the party charged has had actual notice that the property in dispute was in some way affected; whence the Court has imputed a knowledge of all facts, ascertainable by inquiry into the true relations of those circumstances affecting the property, brought home to the knowledge of the party charged. Secondly, into those where the Court draws the conclusion that the party charged has abstained from inquiry for the purpose of avoiding notice.

A third class. But it is obvious that this division leaves open a third class—of those cases where any knowledge as to circumstances affecting the estate is in fact disproved and where there is no deliberate absti-

¹ Per Eyre, C.B., *Plumb v. Fluitt*, 2 Anstr. 432, at 438, discussed 2 Spence Eq. Jur. 787. Lord Brougham, C., in *Kennedy v. Green*, 3 My. & K. 699, at 719, said: "The doctrine of constructive notice depends upon two considerations; first, that certain things existing in the relation or the conduct of parties, or in the case between them, beget a presumption so strong of actual knowledge, that the law holds the knowledge to exist, because it is highly improbable it should not; and next, that policy, and the safety of the public, forbids a person to deny knowledge while he is so dealing as to keep himself ignorant, or so that he may keep himself ignorant, and yet all the while let his agent know, and himself, perhaps, profit by that knowledge." See *Hunter v. Walters*, L. R. 7 Ch. 75; also the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 3, sub-s. 1; *English and Scottish Mercantile Investment Company v. Brunton* (1892), 2 Q. B. 700; *Dart, Vendors & Purchasers* (6th ed.), 966 *et seqq.* See *Nesbit v. Riverside Independent District*, 144 U. S. (37 Davis) 610, as to the effect of recitals in municipal bonds operating as constructive notice, where it is said at 619, "The effect of recitals in municipal bonds is like that given to words of negotiability in a promissory note. They simply relieve the paper in the hands of a *bond fide* holder from the burden of defences other than the lack of power, growing out of the original issue of the paper, and available as against the immediate payee."

² *Anon.*, *Freem. (Ch.)* 137, Case 171; *Taylor v. Stibbert*, 2 Ves. 437, at 440; *Smith v. Low*, 1 Atk. 489; *Foster v. Cockerell*, 3 Cl. & F. 456; *Lee v. Howlett*, 2 K. & J. 531. As to waiver of notice, see per Bowen, L.J., *Selwyn v. Garfit*, 38 Ch. Div. 273, at 284.

³ *Jones v. Smith*, 1 Hare 43, at 55. "The Conveyancing Act, 1882, really does no more than state the law as it was before, but its negative form shows that a restriction rather than an extension of the doctrine of notice was intended by the Legislature:" per Lindley, L.J., *Bailey v. Barnes* (1894), 1 Ch. 25, at 35.

nence from inquiry, yet where the absence of knowledge can only be accounted for by gross negligence. This the policy of the law affects with the consequences of knowledge, and describes in the words of Alderson, B.,¹ as "such gross negligence as would be a cloak for fraud if permitted."

The adequacy of Wigram, V.C.'s, classification may, however, be vindicated by bearing in mind the principle of law that a purchaser *must* be presumed to investigate the title of the property he purchases, and may therefore be presumed to have examined every link in that title. This presumption stops short of inferring the examination of instruments not connected with the title merely because by possibility they may affect it.²

Wigram, V.C.'s, principle of division explained,

The doctrine of constructive notice again is wholly equitable. "In *Allen v. Seckham*³ I pointed out," said Lord Esher, M.R.,⁴ "that the doctrine is a dangerous one. It is contrary to the truth. It is wholly founded on the assumption that a man does not know the facts; and yet it is said that constructively he does know them." Later on in the same judgment⁵ it is said, "I think the doctrine has been accurately deduced from the various cases, and is accurately stated in the notes to *Le Neve v. Le Neve*." "Although, as we have already seen, where a party has notice of a deed which, from the nature of it, must affect the property,⁶ or is told at the time that it does affect it, he is considered to have notice of the contents of that deed and of all other deeds to which it refers; nevertheless, where a party has notice of a deed which does not necessarily affect the property,⁷ and is told that in fact it does not affect it, but relates to some other property, and such party acts fairly in the transaction, believing the representation to be true, he will not be fixed with notice of the contents of the instrument." Now that is the doctrine formulated in equity; it is not to be carried farther; it is to be construed according to its true meaning, and not to be added to or diminished."

Constructive notice an equitable doctrine.

Notice that the title-deeds of an estate are in the possession

Authorities considered.

¹ *Whitbread v. Jordan*, 1 Y. & C. (Ex.) 303, at 330. See per Lord Lyndhurst, C., *Jones v. Smith*, 1 Ph. 244, at 255; *Kennedy v. Green*, 3 My. & K. 669, at 719.

² *West v. Reid*, 2 Hare 249, at 259. See 2 Spence. Eq. Jur. 755.

³ 11 Ch. Div. 790, at 795.

⁴ *English and Scottish Mercantile Investment Company v. Brunton* (1892), 2 Q. B. 700, at 708.

⁵ *L. c.* at 709.

⁶ *White & Tudor L. C. in Equity* (6th ed.), 26, at 56. Which passage, says Kay, L.J., (1892), 2 Q. B. 718, is substantially taken from the judgment of Lord Lyndhurst, C., in *Jones v. Smith*, 1 Ph. 244, at 253, 254. To the same effect is the language of Jessel, M.R., in *Patman v. Harland*, 17 Ch. D. 353.

⁷ These terms are defined by Lord Esher, M.R., in his judgment in *English and Scottish Mercantile Investment Company v. Brunton* (1892), 2 Q. B. 700, at 709. The case itself affords an excellent example of their application.

Statement of
the law by
Lord Sel-
borne in
Dixon v.
Muckleston.

of one not the possessor of the estate, may be held notice of a claim by him on the estate;¹ though the mere absence of the title-deeds has never been held enough by itself to affect one with notice if he has *bond fide* made inquiry for the deeds, and a good excuse has been given for the non-delivery of them. In *Dixon v. Muckleston*² Lord Selborne, C., states the law to be³ "that when the Court is satisfied of the good faith of the person who has got a prior equitable charge, and is satisfied that there has been a positive statement, honestly believed, that he has got the necessary deeds—then he is not bound to examine the deeds, and is not bound by constructive notice of their actual contents, or of any deficiencies which by examination he might have discovered in them. This I take to be the law even in cases where the depositor of the deeds is himself acting in the double character of borrower of the depositor's money and of solicitor for the depositor." It is otherwise if he omits all inquiries.

Statement
by Turner,
V.C., in *Hewitt*
v. *Loosemore*.

Both branches of the rule are stated by Turner, V.C., in *Hewitt v. Loosemore*:⁴ "The law, therefore, as I collect from the authorities, stands thus: That a legal mortgagee is not to be postponed to a prior equitable one upon the ground of his not having got in the title-deeds, unless there be fraud or gross and wilful negligence on his part. That the Court will not impute fraud, or gross and wilful negligence to the mortgagee, if he has *bond fide* inquired for the deeds and a reasonable excuse has been given for the non-delivery of them; but that the Court will impute fraud, or gross and wilful negligence, to the mortgagee if he omits all inquiry as to the deeds."⁵ The same learned judge subsequently, when Lord Justice, more definitely indicates the limits of the law thus:⁶ "A purchaser or mortgagee is bound to inquire into the title of his vendor or mortgagee, and will be affected with notice of what

¹ *Hiern v. Mill*, 13 Ves. 114; *Dryden v. Frost*, 3 My. & Cr. 670, where the law as to mortgagees' costs is considered. See *National Provincial Bank of England v. Games*, 31 Ch. D. 582; *Spencer v. Clarke*, 9 Ch. D. 137; *Maxfield v. Burton*, L. R. 17 Eq. 15. "It is, in my opinion, the giving of the notice which creates the priority (see *Foster v. Cockerell*, 3 Cl. & F. 456), and if the former assignee is for some reason prevented from giving the notice, either by contract with the assignor, as might often be the case, or by the nature of the charge which he holds, the same result should follow as in a case where a prior assignee has negligently omitted to give the notice that he might have given": per Charles, J., *English and Scottish Mercantile Investment Trust v. Brunton* (1892), 2 Q. B. 1, at 8.

² L. R. 8 Ch. 155.

³ L. c. at 161.

⁴ 9 Hare 449, at 458. "Nothing but fraud or gross and voluntary negligence in leaving the title-deeds will oust the priority of the legal claimant": *Plumb v. Flatt*, 2 Anstr. 432, at 440; *Wormald v. Maitland*, 35 L. J. Ch. 69; *Sharpe v. Foy*, L. R. 4 Ch. 35.

⁵ See *In re Lord Southampton's Estate*, *Allen v. Lord Southampton*, *Banfather's Claim*, 16 Ch. D. 178; *Roper's Claim*, 50 L. J. Ch. 155.

⁶ *Wilson v. Hart*, L. R. 1 Ch. 463, at 467.

appears upon the title if he does not so inquire;¹ nor can it, I think, be disputed that this rule applies to a purchaser or mortgagee of leasehold estates, as much as it applies to the purchaser or mortgagee of freehold estates, or that it applies equally to a tenant for a term of years; and I cannot see my way to hold that a rule which applies in all these cases ought not to be held to apply in the case of a tenant from year to year."²

In a case³ where a solicitor handed his client a packet of deeds, purporting to be the deeds of an estate, while in reality the deeds were not included in the packet but were retained by the solicitor and subsequently parted with to another mortgagee, Turner, L.J., held that the client had not been guilty of gross negligence in not examining them and ascertaining that they were correct so as to preclude him from setting up his title against the second mortgagee. "Clients in the ordinary course of business," said the Lord Justice, "trust their solicitors and negligence cannot be imputed where the ordinary course of business has been observed."

Client defrauded by solicitor.
Hunt v. Elmes.

In another case⁴ a solicitor deposited the title-deeds of his client, a mortgagee, with his own banker as security for an advance. After the death of the solicitor the bankers gave notice to the mortgagor of the property in priority to the mortgagee, nevertheless, the bankers were still held postponed to the mortgagee.

In re Richards,
Humber v.
Richards.

A *cestui que trust* is also entitled to place reliance upon his trustee and is not bound to inquire whether he has committed a fraud against him unless there is something to arouse his suspicions.⁵ On the other hand, the holder of a first equitable interest in property who puts the deeds not into the hands of a person owing him a duty but into the hands of his mortgagor, who uses them to obtain an advance, would be postponed to the maker of such advance.⁷

Cestui que trust
defrauded by
trustee.

A person may be affected with notice of a deed by anything outside the ordinary course of events calculated to suggest to a reasonably prudent man the advisability of making inquiry⁸—

Various modes
of affecting
with notice.

¹ Notice to a purchaser that there is a lease is notice of its contents, (*Hall v. Smith*, 14 Ves. 426) where there is a fair opportunity of ascertaining the contents, *Hyde v. Warden*, 3 Ex. D. 72; *Reeve v. Berridge*, 20 Q. B. D. 523.

² See the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 2, sub-s. 1, which is held not to have altered the rule that a lessee has constructive notice of his lessor's title, *Patman v. Harland*, 17 Ch. D. 353, followed in *English and Scottish Mercantile Company v. Brunton* (1892), 2 Q. B. 700.

³ *Hunt v. Elmes*, 2 De G. F. & J. 578.

⁴ *L. C. at 588.*

⁵ *In re Richards*, *Humber v. Richards*, 45 Ch. D. 589.

⁶ *In re Vernon Ewens & Company*, 33 Ch. D. 402. This also is a solicitor's case, though the principle of the confidential relation applies to trustees.

⁷ *Waldron v. Sloper*, 1 Drew. 193.

⁸ *Kennedy v. Green*, 3 My. & K. 699; *Robinson v. Briggs*, 1 Sm. & G. 188; *Gains-*

Lord Cranworth in *Ware v. Lord Egmont*.

that is, if there is a natural connection between the abnormal circumstance and the point that it is the duty of the person to know;¹ as, for instance, where the purchaser is only able to make out a title by a deed which leads him to another fact which would work disclosure, the purchaser is presumed to have knowledge of it.² The rule has been put as high as that a man must show, not only that he had no information of the suggestive circumstance, but that with due diligence he could not have obtained it.³ The preponderance of authority, however, is against this view. Thus in *Ware v. Lord Egmont*⁴ Lord Cranworth said, "The question, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence." This was the rule adopted in the House of Lords in *Montefiore v. Browne*⁵ and it has since repeatedly been followed.⁶ So that in the case of a purchaser omitting to call for title-deeds he will not be affected with notice of a fraud by the person of whom he was bound to make the inquiry, in addition to being affected with the knowledge that they are in the possession of some holder for value;⁷ nor yet if he is told, by the person who gives him notice of a deed, which does not necessarily affect the property, that it does not affect the particular property he is going to deal with.⁸

Notice in regard to personal estate and notice in regard to real estate.

There is a distinction also between notice in regard to personal estate and notice relating to real estate. Where an equitable

borough *v. Watcombe Terra Cotta Company*, 54 L. J. Ch. 991. The doctrine of *Kennedy v. Green* is exhaustively considered in connection with the English cases in *Green v. Fletcher*, 8 N. S. Wales R. (Eq.) 58. In *Rolland v. Hart*, L. R. 6 Ch. 678, Lord Hatherley, C., distinguishes *Kennedy v. Green*. See further, Sugden, *Vendors and Purchasers* (14th ed.), 756. Lord St. Leonards expressed disapproval of the decision in *Marjoribanks v. Hovenden*, Drury (Ir. Ch.), 11. James, L.J.'s criticism in *Hunter v. Walters*, L. R. 7 Ch. 75, at 84, should also be referred to. See, too, *Kettlewell v. Watson*, 21 Ch. D. 685, 26 Ch. Div. 501.

¹ *Greenslade v. Dare*, 20 Beav. 284. Cp. *Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. c. 41), s. 55, sub-s. 1.

² *Biscoe v. Earl of Banbury*, 1 Cases in Ch. 287; *Moore v. Bennett*, 2 Cases in Ch. 246; *Davies v. Thomas*, 2 Y. & C. (Ex.) 234.

³ *Wason v. Wareing*, 15 Beav. 151.

⁴ *De G. M. & G.* 460, at 473.

⁵ *H. L. C.* 241.

⁶ *Cavander v. Bulteel* (1871), L. R. 9 Ch. 79, at 81 n. per Wickens, V.C.; *Banco de Lima v. Anglo Peruvian Bank* (1878), 8 Ch. D. 160, per Malins, V.C., at 175; *In re A. W. Hall & Co.* (1887), 37 Ch. D. 712, per Stirling, J., at 720, 721. See also *Macbryde v. Eykyn*, 24 L. T. (N. S.) 461, per Malins, V.C., at 464.

⁷ *Hipkins v. Amery*, 2 Giff. 292, at 301.

⁸ *Jones v. Smith*, 1 Hare 43, affirmed, 1 Ph. 244, and referred to by Charles, J., in *English and Scottish Mercantile Investment Trust v. Brunton* (1892), 2 Q. B. 1, at 10, as establishing in conjunction with *Patman v. Harland*, 17 Ch. D. 357, the distinction between documents which must necessarily, and those which may or may not affect title. Charles, J.'s judgment was affirmed (1892) 2 Q. B. 700. *Cox v. Coventon*, 31 Beav. 378; *Grosvenor v. Green*, 28 L. J. Ch. 173; *Borell v. Dann*, 2 Hare 440; *Reeve v. Berridge*, 20 Q. B. D. 523; *Hill v. Simpson*, 7 Ves. 152.

charge is given on personal estate in the hands of a trustee notice to the trustee is necessary as against subsequent incumbrancers, though this is not so in the case of land.¹ But as to this—more presently.²

Notice, said Lord Cairns, C., in a case of personal estate,³ should be in writing to the trustees of the property on which the incumbrance is given. If there is no writing the holder of the security is exposed to two dangers: first, the danger of the trustee being left in entire ignorance of the security; and next, “if he attempts to prove knowledge of the trustees *aliunde*, the difficulty which this Court will always feel in attending to what are called casual conversations, or in attending to any kind of intimation which will put the trustee in a less favourable position as regards his mode of action than he would have been in if he had got distinct and clear notice from the incumbrancer.” Yet in some circumstances, notwithstanding, a trustee may be fixed with knowledge of an incumbrance where there is no express notice from the incumbrances. “It must depend upon the facts of the case; but I am quite prepared to say that I think the Court would expect to find that those who alleged that the trustee had knowledge of the incumbrance had made it out, not by any evidence of casual conversations, much less by any proof of what would only be constructive notice—but by proof that the mind of the trustee has in some way been brought to an intelligent apprehension of the nature of the incumbrance which has come upon the property, so that a reasonable man, or an ordinary man of business, would act upon the information and would regulate his conduct by it in the execution of the trust. If it can be shewn that in any way the trustee has got knowledge of that kind—knowledge which would operate upon the mind of any rational man, or man of business, and make him act with reference to the knowledge he has so acquired—then I think the end is attained, and that there has been fixed upon the conscience of the trustee, and through that upon the trust fund, a security against its being parted with in any way that would be inconsistent with the incumbrance which has been created.”

In *Browne v. Savage*⁴ it was laid down that notice to one trustee is notice to all. But this is stigmatised by Lindley, L.J.,⁵ as “one of those misleading generalities against which it is necessary to be on one’s guard.” The more accurate statement of

³ *Requisites of notice.*

⁴ *Browne v. Savage* commented on by Lindley, L.J., in *Low v. Bouverie*.

¹ *Union Bank of London v. Kent*, 39 Ch. Div. 238.

² *Post*, 1644.

³ *Lloyd v. Banks*, L. R. 3 Ch. 488, at 490. See *Saffron Walden Building Society v. Rayner*, 10 Ch. D. 696, at 703, reversed 14 Ch. Div. 406; *White v. Ellis* (1892), 1 Ch. 188, at 196.

⁴ *Drew*, 635.

⁵ *Low v. Bouverie* (1891), 3 Ch. 82, at 104; *White v. Ellis* (1892), 1 Ch. 188.

the principle, as laid down by the same high authority, seems to be that though notice to one trustee would give priority over a prior incumbrancer who has given notice to none of the trustees, yet notice to one does not affect the others so as to render them liable for their action taken in ignorance of the notice to their co-trustee.¹

Notice of deed, notice of its contents.

Notice of a deed is notice of its contents,² even where there is the most express representation that it contains nothing affecting the title.³ The mere deposit of a document or title is enough in equity to create a charge on the property therein referred to. If, however, the deposit is accompanied by an actual written charge the terms of the written document must be referred to and govern the deposit.⁴

Notice in cases of specific performance.

In cases of specific performance, notice of a lease affects the purchaser only in the absence of misrepresentation and with the knowledge of ordinary covenants. What are ordinary covenants differ with regard to the situation of property or the circumstance of the sale.⁵

Notice must be of a deed actually executed.

Notice of a deed actually executed is necessary, and not notice merely of an intention to execute a deed. "There is no case or reasoning," said Lord Thurlow, "which goes so far as to say that a purchaser shall be affected by notice of a deed in contemplation."⁶ Further, the mere execution of a deed by a witness will not fix him with notice of its contents; for, says Lord Thurlow, "a witness in practice is not privy to the contents of the deed."⁷ Recitals in a deed operate as notice,⁸ even though they are inaccurate;⁹ so, too, does a general notice that an estate is subject to a charge as a judgment, though there is no information as to the exact nature or amount.¹⁰

¹ *Phipps v. Lovegrove*, L. R. 16 Eq. 80. See *Ward v. Duncombe* (1893), App. Cas. 369.

² *Malpas v. Aokland*, 3 Russ. 273.

³ *Taylor v. Stibbert*, 2 Ves. 437.

⁴ *Shaw v. Foster*, L. R. 5 H. L. 321; *London and Canadian Loan and Agency Company, Limited v. Duggan* (1893), App. Cas. 506.

⁵ *Wilbraham v. Livesey*, 18 Beav. 206.

⁶ *Cothay v. Sydenham*, 2 Bro. C. C. 391, at 393; see *Shaw v. Foster*, L. R. 5 H. L. 321, per Lord O'Hagan at 352, *et seq.*; *Williams v. Williams*, 17 Ch. D. 437, per Kay, J., at 442, *et seq.*

⁷ *Beckett v. Cordley*, 1 Bro. C. C. 353, at 357, referring to *Mocatta v. Murgatroyd*, 1 P. Wms. 393, of which Lord Thurlow says: "I do not leave this as a case which I should determine in the same manner." See also per James, L.J., *Stevens v. Mid-Hants Railway Company*, L. R. 8 Ch. 1064, at 1069.

⁸ *Farrow v. Rees*, 4 Beav. 18; *Taylor v. Baker*, 5 Price (Ex.) 306.

⁹ *Hope v. Liddell* (No. 1), 21 Beav. 183, *Dart, Vendors and Purchasers* (6th ed.), vol. ii. 986. As to statutory limitations on the old law, see the *Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. c. 41), s. 3, sub-s. 3. This clause will not affect the purchaser's right to object where the defect is accidentally disclosed by the vendor, *Smith v. Robinson*, 13 Ch. D. 148.

¹⁰ *Taylor v. Baker*, 5 Price (Ex.) 306, *Dan. (Ex.)* 71, where is a valuable reporter's note, which is recognised in *Penny v. Watts*, 1 Hall & Twells, 266, at 282; *Clare Hall v. Harding*, 6 Hare 273.

Lord Romilly held in *James v. Lichfield*¹ that where a vendor contracted to sell property which the purchaser knew was in the occupation of a tenant, there was a duty to inquire as to the interest of the tenant, failing which the purchaser was affected with notice of an agreement for a lease which the tenant had; his decision was followed by the Common Pleas in *Phillips v. Miller*.² In *Caballero v. Henty*³ the Court of Appeal affirming *Jessel, M.R.*, held that the doctrine of notice would be unduly extended if applied as between the vendor and purchaser, and whilst the matter still rests in contract.⁴ The true doctrine was laid down by *James, L.J.*,⁵ as referring only "to equities between the purchaser and the tenant when the legal estate has passed, and to have nothing to do with the rights and liabilities of vendors and purchasers between themselves." *James, L.J.*, thus continues:—"If there is anything in the nature of the tenancies which affects the property sold, the vendor is bound to tell the purchaser, and to let him know what it is which is being sold; and the vendor cannot afterwards say to the purchaser, 'If you had gone to the tenant and inquired, you would have found out all about it.' During the argument I referred to a passage in *Sugden's Vendors and Purchasers*,⁶ which seems to shew that a purchaser is not bound to go to the tenant to inquire." Subsequently the Exchequer Chamber overruled the decision of the Common Pleas in *Phillips v. Miller*.⁷

Duty where property is purchased known to be in the occupation of a tenant.

Conflicting decisions.
Doctrine of *Caballero v. Henty* affirmed.

Possession by a vendor of an estate which he has sold will not be constructive notice of any lien for unpaid purchase-money if the vendor has signed the usual receipt on the conveyance for the whole purchase-money; but otherwise it will.⁸ Nor will the mere circumstance of the vendor having been out of possession many years affect a *bona fide* purchaser and without notice.⁹

Possession by vendor not necessarily notice of lien for unpaid purchase-money.

It has been laid down by Lord Lyndhurst, C.,¹⁰ that "where personal property is assigned, delivery is necessary to complete the transaction, not as between the vendor and the vendee, but as to third persons, in order that they may not be deceived by apparent possession and ownership remaining in a person, who, in

Lord Lyndhurst, C., in *Dearle v. Hall*.

¹ L. R. 9 Eq. 51.

² L. R. 9 C. P. 196.

³ L. R. 9 Ch. 447.

⁴ *Daniels v. Davison*, 16 Ves. 249; *Cavander v. Bulteel*, L. R. 9 Ch. 79.

⁵ L. R. 9 Ch. at 450.

⁶ (14th ed.) at 774.

⁷ L. R. 10 C. P. 420.

⁸ *White v. Wakefield*, 7 Sim. 401; *Mackreth v. Symmons*, 1 White & Tudor L. C. in Equity (6th ed.), 355, note at 387.

⁹ *Barnhart v. Greenshields*, 9 Moo. P. C. C. 18, at 34, 35: "There is no authority" "for the proposition that notice of a tenancy is notice of the title of the lessor; or that a purchaser neglecting to inquire into the title of the occupier, is affected by any other equities than those which such occupier may insist on."

¹⁰ *Dearle v. Hall*, *Loveridge v. Cooper*, 3 Russ. 1 at 58; see *Cochrane v. Moore*, 25 Q. B. Div. 57.

fact, is not the owner. This doctrine is not confined to chattels in possession, but extends to choses in action,¹ bonds, &c." Where delivery cannot be made, notice by the person having the legal estate is substituted.

Effect of omission of person having an equitable interest in a fund to give notice to the tenant of the legal estate.

The principle thus enunciated is the starting-point of the modern doctrine, that the mere omission of a person having an equitable interest in a fund, the legal property of which is in another, to give notice of that interest will of itself give a puisne incumbrancer the priority.² This principle, however, Stirling, J., points out³ is not applicable to a mortgage of real estate; because "by the assignment of the mortgage the debt necessarily passes as incident to it; and it is clear that to constitute a valid assignment notice to the mortgagor is not necessary."⁴

Giving notice analogous to taking possession of an equitable fund.

Where, however, the property is equitable and the legal estate is in trustees, the act of giving the trustees notice is, to a certain degree, taking possession of the fund;⁵ for after notice the trustee of the fund is affected with a direct responsibility to the assignee who has given him notice. The reason for the assertion of this principle lies in the consideration of the power, the *cestui que trust* of such an interest has of taking the same security repeatedly into the market, and inducing third persons to deal with him on the assumption of his absolute ownership of the property, and of the expediency of throwing difficulties in the way of the assignor coming into the market to dispose of that which he had previously sold, and being enabled to obtain "a false and delusive credit."⁶ In such cases, therefore, priority of notice gives priority of title;⁷ and to deprive a person who has done everything he can to complete his title to priority

¹ See the Judicature Act, 1873 (36 & 37 Vict. c. 66) sec. 25, subs. (6); *Law Quarterly Review* (1893) vol. ix. 311, "What is a chose in action?"; *Colonial Bank v. Whinney*, 11 App. Cas. 426, and the judgment of Fry, L.J., s.c. 30 Ch. Div. 261 at 285; *Ryall v. Rowles*, 1 Ves. 348, 2 White and Tudor, L.C., in *Equity* (6th ed.) 799; *Hornsby v. Lee*, 2 Madd. 16, 2 White & Tudor, L.C., in *Equity* (6th ed.) 902.

² *Wright v. Lord Dorchester*, (1809) 3 Russ. 49 n. has been instanced as affording an indication that Lord Eldon favoured the doctrine. But Lord Macnaghten points out in *Ward v. Duncombe* (1893) App. Cas. 369, at 384, that "that case really throws no light upon the point"; and *Wigram, V. C.*, in *Meux v. Bell*, 1 Hare 73, at 83, thinks it "apparent from the judgment in *Evans v. Bicknell* (6 Ves. 174, at 190), that Lord Eldon at that time did not consider the mere omission to give notice" would have the effect contended for. Sir Thomas Plumer in *Cooper v. Fynmore*, (1814) 3 Russ. 60, was of the same opinion. He says, at 64, "mere neglect of notice was not sufficient to postpone" a prior incumbrancer "in order to deprive him of his priority; it was necessary that there should be such laches as, in a Court of Equity amounted to fraud."

³ *In re Richards*, *Humber v. Richards*, 45 Ch. D. 589, at 595.

⁴ Per Sir W. Grant, M. R., *Jones v. Gibbons*, 9 Ves. 407, at 410.

⁵ *Shadwell, V. C.*, in *Jones v. Jones*, 8 Sim. 633, explains that the rule in *Dearle v. Hall* has nothing to do with the assignment of equitable interests in real estate.

⁶ *Dearle v. Hall*, 3 Russ. 1, per Sir Thomas Plumer, M.R., at 13.

⁷ *In re Freshfield's Trust*, 11 Ch. D. 198, followed by *Charles, J.*, *English and Scottish Mercantile Investment v. Brunton* (1892), 2 Q. B. 1.

by giving notice to trustees, there must be negligence so gross as to affect the person guilty with the consequences of fraud.¹

This being the principle, we are to consider certain developments of it.

Lord Lyndhurst, who as Chancellor affirmed *Dearle v. Hall*,² as Chief Baron delivered the judgment in *Smith v. Smith*,³ where it was held that notice to one of several trustees was sufficient to take the property out of the order and disposition of a person subsequently bankrupt. "A second assignee," said Lord Lyndhurst,⁴ "in order to have obtained a priority over the plaintiff must have shewn that he had exercised proper caution in taking the assignment; that he had applied to the trustees to know if any previous assignment had been made; and, unless he applied for this purpose to each of the trustees, he would not have exercised due caution, or done all that he ought to have done."

Commenting on this language in *Ward v. Duncombe*,⁵ Lord Herschell, C., says it is "somewhat remarkable. It would seem, if correctly reported, to indicate the view that a second incumbrancer would only obtain priority over an earlier one if he had used due caution, and had, in fact, made such inquiry as a prudent man would of each of the trustees." It is pointed out that such a view as that attributed to Lord Lyndhurst is in direct conflict with the decision of the House of Lords two years later in *Foster v. Cockerell*,⁶ where the rule⁷ known as the rule in *Dearle v. Hall* is affirmed to be independent of any considerations of the conduct of the competing assignee, if that assignee has no notice of the earlier assignment. Priority in such cases depends simply and solely on priority of notice. Lord Herschell considered⁸ that Lord Lyndhurst cannot have intended to say more than "that where one of several trustees has notice of an incumbrance, the *cestui que trust* is no longer left in apparent possession, for any person asked to take a subsequent assignment, and adopting the precaution which a prudent man would, of inquiring of all the trustees, would come to know of the prior incumbrance."

¹ *Ware v. Lord Egmont*, 4 De G. M. & G. 460; *Montefiore v. Browne*, 7 H. L. C 241; *Bailey v. Barnes* (1894), 1 Ch. 25.

² 2 Cr. & M. 231, followed by Lord Westbury, C., *Willes v. Greenhill*, 4 De G. F. & J. 147.

³ 2 Cr. & M. at 233.

⁴ (1893) App. Cas. 369, at 380.

⁵ 3 Cl. & F. 456. See a criticism of this case, and the various explanations of it by Lord Macnaghten, who concludes that it has come to be treated "as applying only to assignments of choses in action, or of such interests in real estate as can only reach the hands of the beneficiary or assignor in the shape of money" (1893), App. Cas. at 389, 390.

⁶ Said to be derived from the doctrine of *Ryall v. Rowles* 1 Ves. 348, "in the case of a chose in action, you must do everything towards taking possession that the subject admits:" per Sir Thomas Plumer, M.R., *Dearle v. Hall*, 3 Russ. 1, at 23. See per Wigram, V. C., *Wilmot v. Pike*, 5 Hare 14, at 19. ⁷ (1893) App. Cas. at 380.

Timson v.
Ramsbottom.

In *Timson v. Ramsbottom*,¹ after the death of an executor who had notice of an assignment to the exclusion of his co-executors, there was an assignment to a third person who gave notice of it to one of the surviving executors. Lord Langdale, M.R., held that the knowledge which one of several executors has of an assignment made to himself by a legatee is not sufficient to prevail against a subsequent assignee of the same interest who gives notice to a surviving executor, and consequently the assignment to the third person was entitled to priority over the earlier one. The case was carried to appeal, but compromised before hearing.

Considered by
Wigram, V.C.,
in *Meux v.*
Bell.

Comparing this case with *Smith v. Smith*, Wigram, V.C., in *Meux v. Bell*,² said: "In *Smith v. Smith*, inquiry would, in the circumstances of that case, have led to a knowledge of the prior incumbrance, and the notice was therefore properly held sufficient. In *Timson v. Ramsbottom*¹ inquiry would not have led to a knowledge of the prior incumbrance, and the notice was properly held insufficient." In *Smith v. Smith*,³ it may be noted that the trustee who had notice was alive at the time of the second assignment. In *Timson v. Ramsbottom* the executor with notice was dead before the second assignment was made.

Rule in *Dearle*
v. Hall
examined in
Ward v.
Duncombe.

The rule in *Dearle v. Hall* was the subject of a very scrutinizing inquiry in the House of Lords in *Ward v. Duncombe*.⁴ There one of two trustees had notice of a settlement, and it was contended that so long as this trustee lived the settlement had priority of a subsequent charge of which both trustees had notice, but that on his death the subsequent charge obtained priority. Lord Herschell, C., was of opinion⁵ that the leading consideration which induced the Court to lay down the rule in *Dearle v. Hall*, that he who gives notice has a better equitable right than a prior incumbrancer who has given no notice, was "that any other decision would facilitate fraud by the *cestui que trust*, and cause loss to those who might have used every precaution that was possible to ascertain, before parting with their money, that the title they were taking was a valid one." "Where," he says,⁶ "at the time the second advance is made, one of the trustees has notice of a prior incumbrance, I see no reason why notice of the second incumbrance should give it priority over the earlier assignment. The fund was not at the time of the second advance left in the apparent posses-

¹ 2 Keen 35.

² 2 Cr. & M. 231.

³ L. c. at 378.

⁴ 1 Hare 73.

⁵ (1893) App. Cas. 369.

⁶ L. c. at 381.

sion of the *cestui que trust*. The person asked to make the second advance could have protected himself had he chosen to make that inquiry of all the trustees which prudence enjoined." The Lord Chancellor then discriminates the case where at the time of the second advance the trustee, knowing of the first advance, is no longer a trustee. The fund is again in the apparent possession of the *cestui que trust*. A case like this does not, however, "warrant the conclusion that where at the time of the second advance and notice the trustees, through one of their number, were in possession of notice of a prior assignment, the later assignment, although it is not, at the time when notice of it is received by the trustees, entitled to priority over the earlier assignment, becomes entitled to such priority when the trustee who had notice of that assignment dies or ceases to act." The test is what was the title at the time of the advance and when notice was given to the trustees.¹

A hardship was suggested as likely to arise by virtue of the decision of the Court of Appeal in *Low v. Bouverie*,² that trustees of a fund are not under any legal obligation to answer inquiries put to them as to existing incumbrances; but Lord Herschell meets it by saying:³ "If the trustees, or any of them, were to decline to answer such inquiries, it seems to me that the intending incumbrancer would take the risk upon himself of whatever prior incumbrances there might chance to be. He would be dealing with property which he had no sufficient ground for concluding was at the disposal of the *cestui que trust*. He would not be deceived by any apparent possession."

Difficulty suggested by the decision in *Low v. Bouverie*.

Met by Lord Herschell.

We have now to note the effect on the client of knowledge by his solicitor. Most generally the law imputes to the client the knowledge of the solicitor he employs. There is this qualification, however. "If the disclosure of that fact of which knowledge is sought to be fixed upon the client would have imputed fraud to the solicitor, it is not to be presumed that the solicitor did make disclosure of that fact."⁴ "I take it to be very clearly established that if a person employed as a solicitor has done things, which if disclosed would prevent the perfection of

Knowledge of solicitor's knowledge of client.

¹ Lord Macnaghten does not concede even so much. He says at 394, "I take leave, however, to doubt whether the proposition on which the argument is founded can be treated as settled law. There is no authority for it that I know in this country but the case of *Timson v. Ramsbottom*;" which he proceeds to shew was decided on very special facts, besides that the appeal in the case was compromised.

² (1891) 3 Ch. 82, *ante*. See as to the view of Knight Bruce, V.C., in *Etty v. Bridges*, 2 Y. & C. (Ch.) 486, at 493. Lord Macnaghten's comment, (1893) App. Cas. at 393. See also an article on *The Doctrine of Notice to Trustees*, Law Mag. and Review (1893), vol. xix. (4th ser.), 81.

³ (1893) App. Cas. at 383.

⁴ Per Bacon, V. C., *Waldy v. Gray*, L. R. 20 Eq. 238, at 251, 252.

the security on which he is engaged, which would shew that a good title does not exist to that which he is the instrument of conveying to the purchaser, it is not to be expected or inferred that he would communicate what he has done to his client." And the tendency of the later decisions has been to hold that when a man employs a solicitor whose whole purpose and meaning in the transaction is to cheat and defraud his client, and who in furtherance of this intention keeps back purposely from his knowledge the true state of the case, the presumption is conclusively repelled that the client had imputed to him a constructive notice, through the solicitor, of the fact which had been concealed from him.¹

Fuller v.
Benett.

In *Fuller v. Benett*² three propositions on this point seem to have been accepted as indispensable :

First, that notice to the solicitor is notice to the client ;

Secondly, that notice to the solicitor to bind the client must be notice in that transaction in which the client employs him ;³

Thirdly, that where vendor and purchaser employ the same solicitor, each is affected with notice of whatever the solicitor had notice in his capacity of solicitor for either vendor or purchaser in the transaction in which he is so employed.⁴

Effect of
notice of agent.

What is notice to an agent or trustee is notice⁵ to the principal,⁶ and the presumption that a solicitor has communicated to his client facts which he ought to have made known cannot be rebutted by proof that it was the solicitor's interest to conceal them.⁷

No notice
where title-
deeds held by
largest owner.

A purchaser will not be affected with notice of a prior equitable mortgage, by his knowledge that the title-deeds are in the possession of the equitable mortgagee, if the equitable mortgagee, by reason of his being the largest co-owner of the property, is the person who, independent of the mortgage, is entitled to their custody.⁸

¹ Kerr Fraud (2nd. ed.), 274. A negligent entry of a judgment cannot be amended when the amendment would operate to the injury of an innocent third person : *Indiana, &c. Railway Company v. Bird*, 9 Am. St. R. 842.

² 2 Hare 394, at 402. In the judgment the order of propositions 2 and 3 is transposed.

³ *Bulpett v. Sturges*, 22 L. T. (N. S.) 739.

⁴ For the rule as to notice to agent, 2 Kent Comm. 630 n. (b) and *Mr. Holmes's* note to 12th ed.

⁵ Actual not constructive notice to the principal, *Dart Vendors & Purchasers* (6th ed.), vol. ii. 966, *Sugden Vendors & Purchasers* (14th ed.), 756.

⁶ *Le Neve v. Le Neve*, Amb. 436, 2 White and Tudor L., C. in Equity (6th ed.) 26, note at 67, "Constructive notice between principal and agent." *Maxfield v. Burton*, L. R. 17 Eq. 15; *Rolland v. Hart*, L. R. 6 Ch. 678.

⁷ *Bradley v. Riches*, 9 Ch. D. 189. Actual notice amounting to fraud must be proved to affect the holder of a registered deed with notice of a prior unregistered deed : *Wyatt v. Barwell*, 19 Ves. 435. A man cannot be presumed to have disclosed his own fraud : *In re European Bank*, L. R. 5 Ch. 358, at 363.

⁸ *Ex parte Hardy*, 2 D. & C. 393, at 394. See *Agra Bank Ltd. v. Barry*, L. R. 7 H. L. 135, and *Dart Vendors & Purchasers* (6th ed.), vol. i. 516 *et seqq.*

Chitty, J.,¹ following Jessel, M.R., refused to extend the doctrine of constructive notice so as to impute to a director of a company a knowledge of the books, where the accounts had been duly audited, and the auditors were apparently accountants of skill and integrity, since "it would be extending the doctrine of constructive notice far beyond that or any other case."² "It is sufficient," said Chitty, J., "if directors appoint a person of good repute and competent skill to audit the accounts, and have no ground for suspecting that anything is wrong. The directors are not bound to examine entries in the company's books."³

Negligence against negligence, like estoppel against estoppel, sets the matter at large.⁴

Notice
affecting the
director of a
company.

Negligence
against
negligence.

Res judicata.

The rule with regard to *res judicata* is laid down by Wigram, V.C., in *Henderson v. Henderson*,⁵ "where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

¹ *In re Denham & Co.* (No. 1), 25 Ch. D. 752, at 766.

² *Hallmark's Case*, 9 Ch. D. 329, per Jessel, M.R., at 332.

³ 25 Ch. D. 752, at 766.

⁴ Co. Litt. 352 b; per Stuart, V.C., *Ware v. Lord Egmont*, 18 Jur. 371, at 373, affirmed 4 De G. M. & G. 460; *Withington v. Tate*, L. R. 4 Ch. 288.

⁵ 3 Hare 100, at 115; *Worman v. Worman*, 43 Ch. D. 296. *Ante*, 239.

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